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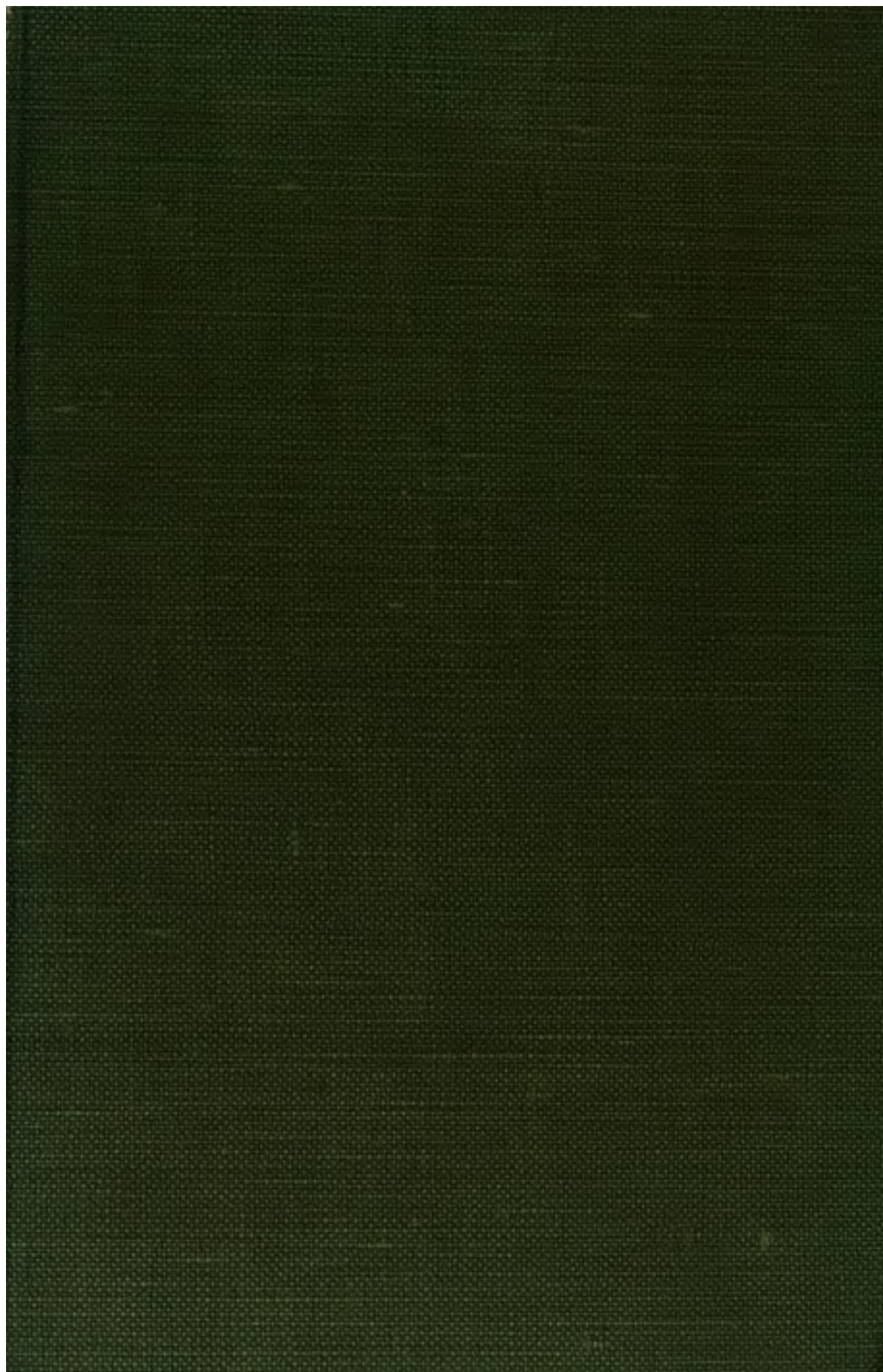
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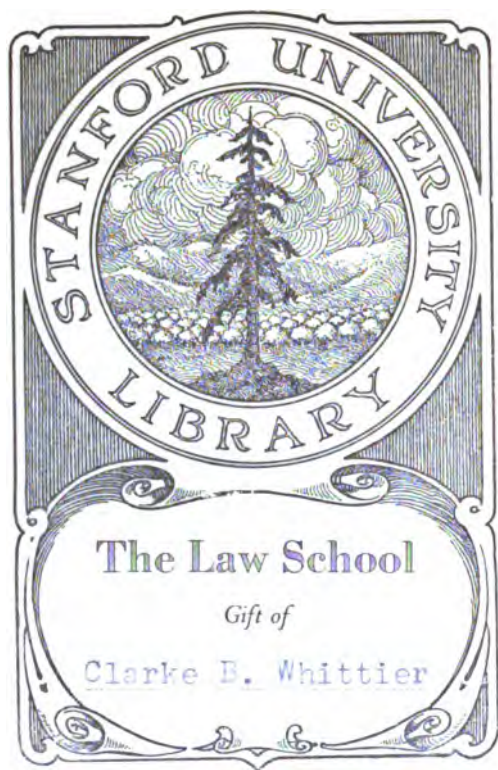
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B/B
B/H
G/J

A SELECTION
OF
CASES AND STATUTES
ON THE
PRINCIPLES OF
CODE PLEADING
WITH NOTES

BY
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UNIVERSITY OF CINCINNATI

Prepared for Use as a Text-Book in Law Schools

CINCINNATI
W. H. ANDERSON AND COMPANY,
1901

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YRABBU BROTHATZ

PREFACE

In the twenty-nine years which have passed since Professor Langdell published his "Selection of Cases on the Law of Contracts, prepared for use as a textbook in Harvard Law School," there has been a great growth of similar case-books on different titles in our law, adjective as well as substantive; but on code pleading, notwithstanding its practical importance in many states of the Union, there has been no case-book fitted for class instruction.

The need of such a book has been felt by me almost from my first meeting with the class in code pleading in the Law School of the Cincinnati University. Our course on that subject was based on a standard treatise and the Ohio code of civil procedure, both supplemented by occasional lectures on special topics, by occasional illustrations from leading cases, and by the drafting of pleadings under the code. There was no systematic and direct study of the cases themselves as embodying principles of code pleading.

Between this method of instruction and that which obtained in classes where cases were used as the basis of instruction, there was evidently a radical difference. With the latter method, the instructor and every member of his class came into direct touch with the subject-matter of their investigation—the cases embodying the principles whose nature and application they sought to understand; with the former method, the law student seldom got beyond the treatise. While reading about the cases under the codes, and the enactments of other code states, he was not studying either at first hand, but rather was memorizing the deductions from them which he found in the treatise.

There was, however, no reason apparent why, with a highly successful use of cases in other subjects of class instruction, a class in code pleading also should not go to the fountain head. However it may be with some rules of practice under the codes, our law of code pleading, like the law of evidence, is not "a handicraft to be practised by rule of thumb," but a science consisting of a body of principles to be found, for the most part, in the adjudged cases. Not only so, but code pleading being a new growth in our law, there is, and there will long be, a special reason for the study of its principles in their actual embodiment.

For these reasons, and also for the sake of the experiment, I formed, three years since, a small class for the direct study, by cases, of certain principles in code pleading which the regular class were studying by means of a treatise. The experiment was hampered by the necessity of resorting, for every case used, to the volume of the reports containing it, but in the main there was an obvious improvement—more stimulation in the class, a more earnest discussion, a greater independence of thought and research, a firmer grasp of principle, a readier command of concrete instance. The result was my adoption of case-study as the basis for a large part of the work of the regular class in code pleading. A further result has been the need of printing the cases and statutes which I wish to use in this method of instruction.

It is not, then, the aim of this work to cover the whole field of instruction in civil procedure under the codes. The rules of practice lie beyond its purpose, although many of them are incidentally illustrated in the cases given. Nor is there any attempt to give all the enactments of code pleading which the law student should study. But the leading purpose of the book is to facilitate, especially for class instruction, the study at first hand of those statutes and decisions which embody the principles of code pleading.

Ultimately, of course, these principles, being those of a statutory system, must be sought in the statute book; and legislators have sometimes fancied that lawyers would find it unnecessary to go beyond the statute book for a comprehension of the new system. There are, it is true, many sections in our codes of civil procedure whose full scope and exact bearing appear so clearly that the courts have had no call to interpret them. But this is rather the exception than the rule. Certainly, the leading and characteristic enactments, those which embody the funda-

mental principles of code pleading, have been continually under consideration and construction by the courts. The history of the new pleading, indeed, repeats with striking emphasis the history of more than one famous achievement in statute-making. A code is never the complete and adequate expression of a complex system of law. At its best, it is but the foundation upon which the courts presently begin to build. We speak of the New York code of 1848, of the Missouri code of 1849, of the Ohio code of 1853, of this or that other code, as if a complete system of code pleading had then appeared. But our code pleading, as an established system, came in no such way. It is a growth, a slow growth, rather than the sudden creation of a legislative *fiat*. The work in hand, then, has chiefly to do with principles thus reached, principles which rest upon a statute, but have been in many ways developed, moderated, distinguished, defined by courts construing the statute.

There is also another thing to be kept in mind when one speaks of the principles of *code* pleading. In its general acceptance in America, and as used in this work, the term "code pleading" is not a mere convenient designation for systems of pleading which have this only in common, that they are all of a statutory origin. With the break-up of common-law pleading, it was possible, and predicted by some, that the legislatures of the different states would create for each a materially different system of civil pleading. This did occur to a limited extent. In the early fifties, before the New York code of 1848 had become the fashion, several states, and notably Massachusetts, enacted systems of pleading which, however excellent, have remained peculiar each to its own state. But it is a fact of very high consequence in our modern jurisprudence that when the break-up of common-law pleading came in force, the states, as a rule, did not go separate ways, but carefully followed in the footsteps of one leader. With slight differences in detail, the systems of pleading which have been enacted in more than half the American states are copied from one model, that of the early New York codes. In all these states, the bench and the bar, building up a new system of pleading, have worked from the same statutory provisions, and under the influence of the same judicial traditions. The process has been more or less halting. Later cases have rejected much that was accepted in the earlier cases as sound doctrine under the codes, and have established distinctions of which the earlier cases show no sign. The trend, however,

has been towards an assimilation of the principles and rules of code pleading in all these different states. And the general result is that, in the stead of our inherited common-law pleading, we have in these states—the “code states,”¹ so called—one widespread statutory pleading. It is this system of pleading—*code* pleading, popularly so called—whose principles are to be sought in the statutes and cases which follow.

In selecting these statutes and cases I have had in view also the development of this branch of our law since the enactment of the code of 1848. Under each principal topic of code pleading I have, therefore, given, first, the original form or forms of the statute in the earliest codes, then its present forms, after the lapse of half a century, in each of the code states, and then a selection of cases unfolding the principles which the courts have found in these statutes.

The forms of the statutory provisions in the different states, are given in the order in which the codes were originally enacted,² as being in itself often instructive to the student and, after a little practice, hardly less convenient than an alphabetical arrangement.

The cases also are given in their chronological order, but this rule is departed from when, as happens not infrequently, a different arrangement appears likely to be more instructive in developing the particular subject.

Throughout the work, and especially on such subjects as the one form of action, I have been at some pains to select cases which present the same principle from different points of view, and as involved in the same or different states of fact.

Occasionally I have given cases which in strictness belong to substantive law; but it will be found, I think, that this has been done only when the doctrine of substantive law is so closely connected with some leading principle of code pleading that the latter can not be clearly presented without the former.

It need hardly be added that my aim is not, in any way or degree, to supplant the study of the particular code under which a law student expects to practise, with a study of codes in general. On the contrary, a leading purpose of the book is to aid the instructor in inciting every member of a class in code pleading to investigate his own code. Various ways in which this can be accomplished, with a well-selected book of cases, will readily

¹ For an enumeration of them, see page 4 of the text.

² See page 4 of the text.

suggest themselves—one, above all, a comparison of the statutory basis of every decision with the corresponding terms of the student's own code.

A word as to the use of treatises on code pleading. I have spoken of giving them up for the cases; yet the treatise is often of value in class instruction. The difference lies in the character of its use. As the *basis* of class study and instruction, a treatise on code pleading is, in my judgment, out of its proper place; as an auxiliary, it serves a useful end in more ways than one. And it is also to be said that with the study of a properly selected book of cases on code pleading a law student finds very much more of real value in a well written treatise on the same subject than he can otherwise hope to find in it.

CHARLES M. HEPBURN.

15 AND 16 CARLISLE BUILDING,
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CASES AND STATUTES

ON THE

PRINCIPLES OF CODE PLEADING.

CHAPTER I.

ORIGIN, NATURE, AND EXTENT OF CODE PLEADING.

In its natural and widest sense the modern phrase "code pleading" denotes any system of pleading whose principles have been reduced to the form of a statute. So understood, the term would apply as well to the statutory pleading of Louisiana as to that of New York, to the statutory pleading of Germany as to that of England. But popular usage in our courts, while not refusing the term its wider meaning, tends to apply it to one kind of statutory pleading as if it were the only kind. For the system to which American decisions and text-books commonly refer as unqualifiedly "code pleading" is not found in every country or even in every state of the Union where the principles of pleading have been reduced to the form of a statute. Rather, it is a peculiar system, pre-eminent in geographical extent.

It is apparently an abuse of terms to speak of any system of statutory pleading as if it were common to distinct states. For code pleading, *ex vi termini*, always rests definitely upon the existing enactments of some particular state—enactments which have no virtue of their own beyond the state line. In any given case, the code pleading of one state can properly enough be regarded as standing by itself, a distinct system independent of the code pleading of every other state. Nevertheless, it is customary to speak of the peculiar form of statutory pleading under consideration as if it were one system possessed in common by many states. Standard textbooks have long treated, not of the "code pleading of New York," or the "code pleading of Ohio," or the code pleading of this, that, or the other state or group of states, but simply of "code pleading." The same tone appears time and again in the decisions. And, in fact, there is excellent warrant for this in the remarkable family likeness of all these codes.

Wherever the "code pleading" of our decisions and textbooks is found, its cardinal characteristics center about two things—a common origin and a common purpose. Characteristically, code pleading with

us is that form of statutory pleading which (1) has arisen out of the English common law procedure, and (2) provides for the following: (a) one judicial instrument—a "single form of action"—for the protection of all primary rights, whether legal or equitable; (b) a limited pleading characterized by plain and concise statements of the actual substantive facts, and none but such substantive facts, of the cause of action; (c) the bringing in of new parties, and the joinder of different causes of action between the necessary parties, with a view to the complete determination of the whole controversy; (d) the adjustment of the relief according to the substantial rights, pleaded and proven, of all the parties before the court, and of each of them, be they few or many.

With such characteristics, "code pleading" is often antagonistic to common law pleading. Yet the causes which gave rise to code pleading lay in the common law itself, and the materials out of which code pleading is constructed are those which had become available through the development of English and American jurisprudence in both legal and equitable causes. Revolutionary as it seemed to be, the direct aim of the codes was not so much to destroy both the root and the branch of the existing systems—the pleading at law and the pleading in equity—and to put an entirely new pleading in their place, as to reduce these venerable and often conflicting modes of pleading to one simple, uniform system, free from the faults and defects which the experience of centuries had revealed in them. The result was, indeed, a new pleading, markedly different from both the older systems. But it is plain at every turn that the new pleading is built out of the old. Much is discarded, but rarely is new material introduced. And not only was code pleading built out of the older systems, it was designed for the same purpose which they had sought to serve—the administration of the substantive common law of England.

So marked is their common origin and common purpose that these different systems of "code pleading," however distinct and independent each of the other, as being statutes of sovereign states, still make up a highly individualized group of codes. They may well be considered together as constituting a system of their own, or as but distinct expressions of the same system.

This family likeness is strengthened, in America at least, by another fact: very many of these codes have been framed with painstaking exactness upon the lines of one or the other of the two or three earliest codes, themselves formed after one model. The same general topics, the same arrangement of divisions and subdivisions, the same phraseology are steadily repeated through more than a score of American codes. They are one in spirit; to a marked degree they are one in the letter also. And, while the letter of this system has not been so often repeated outside the United States, the cardinal characteristics men-

tioned above are found in many other statutes besides those which establish the American codes.

Apart from any question as to the merits of this type of pleading, its geographical extent gives it an easy pre-eminence over every other American and English statutory pleading, and over what is left of common law pleading. The latter was not so widespread in its palmy days. For "code pleading" has already supplanted it or usurped its natural place in twenty-seven states of the American Union, and in essentials if not in the very letter has dispossessed common law pleading in England, and has found its way into India, into the colonies of Australia, into the Dominion of Canada, and widely elsewhere among the British possessions. Following the sway of the Anglo-Saxon, it has encircled the earth.

Within the American Union code pleading now prevails in four of the Atlantic States, in three of the Central States, and almost exclusively in the West—in Connecticut, New York, North Carolina, and South Carolina; in Kentucky, Ohio, and Indiana; and in Wisconsin, Minnesota, Iowa, Missouri, Arkansas, Indian Territory, Oklahoma, Kansas, Nebraska, South Dakota, North Dakota, Montana, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, Idaho, Washington, Oregon, and California.

The states named above make up what are commonly called the "code states"; there is a tendency to group all the other members of the Union as "common law states." But here a distinction or two must be kept in mind. In every one of the United States statutory modifications of the older procedure have been so many and so great that the system of common law pleading no longer exists anywhere with us in its entirety. By "common law states," then, is to be understood those states in which the pleading is partly according to common law rules, whether now existing as unwritten law or in the form of statutory enactments, and partly according to new statutory requirements, *with the common law element predominating*. The term may be applied, with more or less appropriateness, to the states of Maine,¹ New Hampshire, Vermont, Rhode Island, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, and Florida, Illinois, and Michigan, and the District of Columbia.

But not all the remaining states are "common law states," even in this loose sense. Massachusetts, Maryland, Tennessee, Georgia, Alabama, and Mississippi have not established "code pleading" in the sense already explained, but they have established fairly complete statutory systems, which, like "code pleading," arise out of the common law, and in other respects are very near akin to "code pleading."

¹ Maine, however, is sometimes included among the "code states" (So Dillon, *Laws and Jurisprudence*, 260n, and Phillips, *Code Pleading*, 166n, both quoting from Mr. David Dudley Field's paper for the Columbian Exposition); but the published statutes of Maine fail to bear this out. It is rather a common law state with statutory modifications.

In a sharply drawn division between "code states" and "common law states," they are to be ranked with the former. For convenience they may be referred to as quasi-code states. With them should be included the state of Texas, whose statutory civil pleading, although not founded on common law, has very closely approximated the system of rules found in the "code states" generally.

Another distinction is to be noted here. Predominant in the United States and first established there, "code pleading" has been somewhat formally designated as the "American system," as if it were peculiar to the United States. This was true enough for a quarter of a century, and the term is still a convenient term in several ways; but, when used with respect to the essentials of the system to which it refers, it is now apt to mislead. "Code pleading," in the sense already explained, is no longer peculiar to the United States. It holds an even more complete sway in England, in Ontario, in Nova Scotia, in Victoria, and elsewhere in the British Empire. In its essentials, it is characteristically that system of pleading which the great majority of English-speaking peoples have deliberately adopted within the last half century for their courts of record.¹

The codes which wrought this revolutionary change begin in America with the New York Code of Procedure of 1848, in England with the Judicature Acts of 1873 and 1875. The other codes follow in rapid succession, the American legislatures, with scarcely an exception, keeping close to the letter of the New York act and its earlier amendments,² the English colonial legislatures copying no less carefully the enactments of the mother country.³

The American codes, bearing different titles—"code of procedure," "code of civil procedure," "code of practice," "practice art," "civil practice art," "civil code"—appeared in this order: the New York code in 1848, the code of Missouri in 1849, that of California in 1850, of Kentucky in 1851, of Iowa in 1851, of Minnesota in 1851, of Indiana in 1852, of Ohio in 1853, of Oregon in 1854, of Washington in 1854, of Nebraska in 1855, of Wisconsin in 1856, of Kansas in 1859, of Nevada in 1861, of Dakota in 1862, of Idaho in 1864, of Arizona in 1864, of Montana in 1865, of North Carolina in 1868, of Arkansas in 1868, of Wyoming in 1869, of South Carolina in 1870, of Utah in 1870, of Colorado in 1877, of Connecticut in 1879, of Oklahoma in 1890, of Indian Territory of 1890,⁴ of New Mexico in 1897.

¹ The foregoing passages are from Hepburn's *Historical Development of Code Pleading*.

² At first, however, there was considerable hesitation over the "fusion" of law and equity.

³ The subject is somewhat fully treated in Hepburn's *Historical Development of Code Pleading*.

⁴ By Act of Congress, May 2, 1890, the existing code of Arkansas was substantially adopted for the Indian Territory (20 U. S. Stats. at Large, p. 81).

CHAPTER II.

THE ONE FORM OF CIVIL ACTION.

SECTION I. THE TERMS OF THE STATUTE.

A. *The Leading Original Enactments.*

NEW YORK: The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and there shall be in this State, hereafter, but one form of action, for the enforcement or protection of private rights and the redress or prevention¹ of private wrongs, which shall be denominated a civil action. (*Laws of 1848, Chap. 379, § 62, April 12, 1848.*)

MISSOURI: The distinction between the different actions at law, and between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this State, hereafter, but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be denominated a civil action. (*Laws of 1848-9, p. 73; Act of February 24, 1849, § 1.*)

CALIFORNIA: There shall be in this State, hereafter, but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action. (*Laws of 1849-50, chap. 142, Act of April 22, 1850, § 1.*)

KENTUCKY: The forms of all actions and suits, heretofore existing, are abolished; and hereafter, there shall be but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be called a civil action. (*Act of March 22, 1851, Code of Practice in Civil Cases, Title 1, § 1.*)

The proceedings in a civil action may be of two kinds, (1) Ordinary, (2) Equitable. (*Ibid, § 3.*)

The plaintiff may prosecute his action by equitable proceedings, in all cases where courts of chancery, before the adoption of this code, had jurisdiction; and must so proceed in all cases where such jurisdiction was exclusive. (*Ibid, § 4.*)

An error of the plaintiff as to the kind of proceedings adopted, shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings by an amendment in the pleadings and a transfer of the action to the proper docket. (*Ibid, § 6.*)

OHIO: The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are

¹ "Or prevention" omitted in 1849 and subsequently in New York.

abolished; and in their place, there shall be, hereafter, but one form of action, which shall be called a civil action. (*Act of March 11, 1853, Code of Civ. Pro.*, § 3.)

B. *The Present Terms of the Statute.*

NEW YORK: There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished. (*Code of Civil Pro.* § 3339.)

MISSOURI: There shall be in this state but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be denominated a civil action. (*Rev. Stats.*, 1889, § 1989.)

CALIFORNIA: There is in this State but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs, (*Code of Civ. Pro.* § 307.)

KENTUCKY: There shall be but one form of action. (*Civ. Co. of Prac.* § 4.) Actions are ordinary or equitable. (*Ibid* § 5.) Unless otherwise provided by this code or other statute, (1) Actions of which courts of chancery had jurisdiction before the first day of August, 1851, may be equitable; and actions of which such jurisdiction was exclusive must be equitable. (2) All other actions must be ordinary. (*Ibid* § 6.)

An error of the plaintiff as to the form of action shall be cause, not for the abatement or dismissal of it, but merely for a change into the proper proceedings by an amendment of the pleadings and a transfer of the action to the proper docket. (*Ibid*, § 8.)

IOWA: All forms of actions are abolished; but proceedings in a civil action may be of two kinds, ordinary or equitable. (*Code of Iowa*, 1897, § 3426.)

The plaintiff may prosecute his action by equitable proceedings in all cases where courts of equity, before the adoption of this code, had jurisdiction, and must so proceed in all cases where such jurisdiction was exclusive. (*Ibid*, § 3427.)

In all other cases, unless otherwise provided, the plaintiff must prosecute his action by ordinary proceedings. (*Ibid*, § 3431.)

An error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the actions, but merely a change into the proper proceedings, and a transfer to the proper docket. (*Ibid*, § 3432.)

MINNESOTA: The distinction between actions at law and suits in equity, and the forms of all such actions and suits, are abolished; and there shall be in this state but one form of action, for the enforcement or protection of private rights, and the redress of private wrongs; which shall be called a civil action. (*Stats.* 1894, § 5131.)

INDIANA: There shall be no distinction in pleading and practice between actions at law and suits in equity; and there shall be but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action. (*Stats., Rev. of* 1894, § 249.)

OHIO: There shall be but one form of action, which shall be known as a civil action. (*Rev. Stats.*, § 4971.)

OREGON: The distinction heretofore existing between forms of action at law is abolished, and hereafter there shall be but one form of action at law for the enforcement of private rights or the redress of private wrongs. (*Code of Civ. Pro.*, § 1, *Hill's Annotated Laws of* 1892.)

The enforcement or protection of a private right, or the prevention of or redress for an injury thereto, shall be obtained by a suit in equity in all cases where there is not a plain, adequate, and complete remedy at law; and may be obtained thereby in all cases where courts of equity have been used to exercise concurrent jurisdiction with courts of law, unless otherwise specially provided in this chapter. (*Ibid*, § 380.)

WASHINGTON: There shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be called a civil action. (*Code of Pro.*, § 109, *Hill's Annotated Stats. and Codes*, 1891.)

NEBRASKA: The distinction between actions at law and suits in equity, and the form of all such actions and suits heretofore existing are abolished; and in their place there shall be hereafter but one form of action, which shall be called a civil action. (*Code of Civ. Pro.*, *Compiled Stats.*, 1897, § 5592.)

WISCONSIN: The distinction between actions at law, and suits in equity, and the forms of all such actions and suits, have been abolished, and there is in this state but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which is denominated a civil action. (*Stats. of* 1898, § 2600.)

KANSAS: *As in Ohio originally.* (*Code Civ. Pro.*, § 6, *Kan. Gen. Stats.*, 1897.)

NEVADA: There shall be in this state but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs. (*Code of Civil Pro.*, *Gen. Stats.*, 1885, § 3023.)

NORTH DAKOTA: The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing are abolished; and there shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action. (*Code of Civ. Pro.*, *Rev. Codes*, 1895, § 5181.)

SOUTH DAKOTA: *As in North Dakota.* (*Code of Civ. Pro.*, *S. Dak.*, *Annotated Stats.*, 1899, § 6030.)

IDAHO: There is in this territory but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs; *Provided*, That in all matters not regulated by this code, in which there is any conflict or variance between the rules of equity jurisprudence and the rules of the common law, with reference to the same matter, the rules of equity shall prevail. (*Rev. Stats.*, 1887, § 4020.)

MONTANA: There is in this state but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs. (*Code of Civ. Pro.*, § 460, *Montana Codes*, 1895.)

ARIZONA: The complaint shall set forth clearly the names of the parties and their residence, if known, with a full and clear statement of the cause of action, without any distinction between suits at law and in equity. (*Revised Stats.*, 1887, § 668.)

NORTH CAROLINA: The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished, and there shall be hereafter but one form of action for the enforcement or protection of private rights, and the redress of private wrongs, which shall be denominated a civil action. (*Code*, 1883, § 133.)

SOUTH CAROLINA: There shall be in this state but one form of action for the enforcement or protection of private rights, and the redress of private wrongs, which shall be denominated a civil action. (*Rev. Stats.*, 1893, § 89.)

ARKANSAS: The forms of all actions and suits heretofore existing are abolished. (*Digest of Stats.*, 1894, § 5604.) There shall be but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be called a civil action. (*Ibid.*, § 5605.)

The proceedings in a civil action may be of two kinds, *first*, at law, *second*, in equity. (*Ibid.*, § 5607.)

The plaintiff may prosecute his action by equitable proceedings in all cases where courts of chancery, before the adoption of this code, had jurisdiction, and must so proceed in all cases where such jurisdiction was exclusive. (*Ibid.*, § 5608.)

In all other cases the plaintiff must prosecute his action by proceedings at law. (*Ibid.*, § 5609.)

An error of the plaintiff as to the kind of proceedings adopted, shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings by an amendment in the pleadings and a transfer of the action to the proper docket. (*Ibid.*, § 5615.)

WYOMING: *As in Ohio originally.* (*Rev. Stats. of Wyoming*, 1887, § 2360.)

UTAH: *As now in California.* (*Rev. Stats. of Utah*, 1898, § 2852.)

COLORADO: The distinction between actions at law and suits in equity, and the distinct forms of actions, and suits heretofore existing, are abolished, and there shall be in this state but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be the same at law and in equity, and which shall be denominated a civil action, and which shall be prosecuted and defended as prescribed in this act. (*Laws of 1887*, p. 97.)

CONNECTICUT: There shall be but one form of civil action. . . . (*Gen. Stats.*, 1888 § 872.) All courts, which are vested with jurisdiction both at law and in equity, may hereafter, to the full extent of their respective jurisdictions, administer legal and equitable rights, and apply legal and equitable remedies, in favor of either party, in one and the same suit, so that legal and equitable rights of the parties may be enforced and protected in one action: *provided*, that wherever there is any variance between the rules of equity and the rules of the common law, in reference to the same matter, the rules of equity shall prevail (*Ibid.*, § 877).

OKLAHOMA: The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and in their place there shall be, hereafter, but one form of action, which shall be called a civil action. (*Stats.*, 1863, § 3882.)

NEW MEXICO: There shall be in the territory but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be denominated a civil action. (*Compiled Laws*, 1897, § 2685, *Sub. Sect. 1.*)

Our forms of action are not mere rubrics nor dead categories ; they are not the outcome of a classificatory process that has been applied to pre-existing materials. They are institutes of the law ; they are—we say it without scruple—living things. Each of them lives its own life, has its own adventures, enjoys a longer or shorter day of vigour, usefulness and popularity, and then sinks perhaps into a decrepit and friendless old age. A few are still-born, some are sterile, others live to see their children and children's children in high places. The struggle for life is keen among them and only the fittest survive.

The last years of Henry III. 's day we may regard as the golden age of the forms. We mean that this was the time in which the number of forms which were living and thriving was at its maximum. Very few of the writs that had as yet been invented had become obsolete, and, on the other hand, the common law's power of producing new forms was almost exhausted. Bracton can still say, *Tot erunt formulae brevium quot sunt genera actionum*. A little later we shall have to take the tale of writs as the fixed quantity and our maxim will be *Tot erunt genera actionum quot sunt formulae brevium*. Only some slight power of varying the ancient formulas will be conceded to the chancellor ; all that goes beyond this must be done by statutes, and, when Edward I. is dead, statutes will do little for our ordinary private law. The subsequent development of forms will consist almost entirely of modifications of a single action, namely, Trespass, until at length it and its progeny—Ejectment, Case, Assumpsit, Trover,—will have ousted nearly all the older actions. This process, if regarded from one point of view, represents a vigorous, though contorted, growth of our substantive law ; but it is the decline and fall of our formulary system, for writs are being made to do work for which they were not originally intended, and that work they can only do by means of fiction. (1 *Hist. Eng. Law*, 208, 2 *Id.* 556, 559, 562.)

SIR FREDERICK POLLOCK : Redress for manifest wrong appears to us a matter of course, and we work out legal problems in full assurance that the solution, when finally arrived at, will be acted upon without difficulty. There were times when the problem was whether and by what means right could be done at all. Our modern maxim "No right without a remedy" assumes the benevolent and irresistible power of the modern law-giver. Under early forms of law "no remedy no right," would be nearer the truth : a man who could not fit his case exactly to an appropriate remedy among a strictly limited number of formulas had practically no right.

The expansion of remedial justice, the perfection of executive method, are no less important in the history of law than the development of positive rules. What is more, the form in which positive rules are declared, the directions in which definition is attempted or left alone, and the extent to which it is carried in particular branches of the law, depend

largely on the procedure by which the rules are to be applied. (11 *Harv. Law Rev.*, 1898, 424-5.)

LORD RAYMOND: We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion: if the act in the first instance be unlawful, trespass will lie; but if the act is *prima facie* lawful (as it was in this case) and the prejudice to another is not immediate, but consequential, it must be an action upon the case, and this is the distinction. (*Reynolds v. Clarke*, 1725, 1 *Str.* 634, 635.)

VAN NESS, J.: It is of importance that the boundaries between the different actions should be preserved, particularly between the action of *trespass* and *case*. In the case of *Sevignac v. Roome* (6 Term Rep. 125), the judgment was arrested, after a trial and verdict for the plaintiff, because it appeared from the declaration that the action ought to have been *trespass* and not *case*. (*Vail v. Lewis*, 1809, 4 Johns., N. Y. 450, 458.)

WOODS, C. J.: The various forms of action have always been regarded as substantial and material. A uniform practice has treated them as being so. (*Little v. Morgan*, 1855, 31 N. H. 499, 500.)

SAMSON MASON: I do not wish this commission,¹ when appointed, to feel compelled to abolish all of the old forms. I do not wish to see all distinction between law and chancery broken down. By such a course you would have all things legal so mixed and commingled that no lawyer could tell where he was. The youngest member of the bar would have enough to do to learn all of your forms.

The old land-marks are obliterated—the mile-stones removed—the “signs” have been knocked down in a riot—all is confusion, and everything is confused. Call upon the oldest and ablest lawyer and he can not help you. Three-fourths of the law libraries may as well be thrown out upon the common. The books upon evidence are useless, because those books are mostly taken up with the forms of actions. Everything is changed. The costly lamp of experience no longer lights up our pathway. We are out upon an unknown sea of experiment, without chart or compass. (1 *Ohio Debates*, 577, *Constitutional Convention*, 1850.)

MR. JUSTICE SELDEN: In that stage of transition through which the forms and modes of judicial proceedings are now passing in this state, there is nothing which occasions more just anxiety than the settlement of those rules and principles which are hereafter to govern parties in making their respective allegations. The science of legal pleading is broken up. Its foundations are now to be relaid, if there is any one who can meet the responsibility of acting judiciously upon the subject with unshaken nerve. I am not the man. It required

¹ The commission proposed in, and afterward appointed under, Article xiv. of the Ohio Constitution of 1851, to “revise, reform, simplify, and abridge the practice, pleadings, forms, and proceedings of the courts of record of this state, and, as far as practicable and expedient, to provide for the abolition of the distinct forms of action at law, now in use, and for the administration of justice by a uniform mode of proceeding, without reference to any distinction between law and equity.”

great boldness to tear down this science ; it requires almost equal courage to build up another in its place. But let each one whose duty it may become to aid in the erection of the new edifice, lay his block ; and if found not to fit, let more skillful masons remove it and fill the vacancy with another. (*Wooden v. Waffle*, 1851, 6 How. Pr., N. Y., 145, 148.)

MR. JUSTICE GRIER : This system [of common law pleading], matured by the wisdom of ages, founded on principles of truth and sound reason, has been ruthlessly abolished in many of our states, who have rashly substituted in its place the suggestions of sciolists, who invent new codes and systems of pleadings to order. But this attempt to abolish all species, and establish a single genus, is found to be beyond the power of legislative omnipotence. They can not compel the human mind not to distinguish between things that differ. The distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things ; it is absolutely inseparable from the correct administration of justice in common-law courts. (*McFaul v. Ramsey*, 1857, 20 How. 523, 525.)

NEW YORK COMMISSIONERS ON PRACTICE AND PLEADINGS : Personal actions, as they existed at common law, and as they are still retained in this state, are divided into actions *ex contractu* and *ex delicto*. These again are subdivided, the former into actions of account, assumpsit, covenant, debt, annuity, and scire facias ; and the latter into trespass, trespass on the case, and replevin. . . . Within some one of these forms of action, every injury to personal rights, which is the subject of legal redress, must be brought ; and the failure to select the one which is strictly appropriate, is as fatal to the rights of the party, as his failure to sustain the merits upon which his claim to redress is founded. There is no branch of legal science upon which so much curious, and we may be permitted to add, unnecessary learning has been expended, as in the attempt to define the precise boundaries which distinguish these various forms of action. (*Report of February 29, 1848*, pp. 78, 81.)

OHIO COMMISSIONERS ON PRACTICE AND PLEADINGS : We say it is practicable to abolish the distinctions between actions at law. We know that very many of them have passed away by mere neglect, and some of the few we have retained, are now languishing in obscurity and oblivion. Our chancery practice owes its origin in part to this defect in the law practice, and has, long since, fully illustrated the proposition, that one form of action will answer for every case. The simple petition has served for all the cases cognizable in the courts of chancery, and they are quite as complex and various, as those that must be brought in the courts of law.

Is it expedient to abolish the distinctions between actions at law ?

There are in Ohio, say ten actions for law cases, and but one for chancery cases. These ten actions are different, each from every other

one, and each one has been framed for a particular purpose. Where claims of one kind are used, the action must be *assumpsit*; for claims of another kind, the action must be *covenant*; of another, *trespass*; of another, *trespass on the case*, and so throughout.

For every class of claims there is an appropriate action. If a party having a claim, sue upon it and mistake the appropriate action, the mistake is fatal to the suit. "In some cases, there is only one action, by which the plaintiff can succeed. There is one right action and eight or nine wrong ones. In other cases there are two or more actions, either of which will enable him to recover; but generally some one is more appropriate than any other, and will afford the means of taking some advantage. If the wrong action be brought, as we have before said, the error is fatal. The plaintiff must go out of court." He may have served his adversary in due time; he may have advised him fully of the nature of his claim; he may have proceeded openly and fairly; but this will not be considered, if the action be a wrong one, as *trespass*, when it should have been *trespass on the case*. He must pay the costs, and go out of court. If he choose, he may begin again; but he must be careful to adopt the right action, for no other will bring his case into court.

It is often very difficult to determine the right action. The client is, of course, entirely ignorant about it, and good lawyers are not seldom perplexed in making the selection. Time and money have been wasted, and much injustice has been done by the application of this rule. The cases where parties have been turned out of court for such mistakes are numberless, and occupy a large space in the volumes of reports. This evil may be remedied in part by statutes of amendments, and probably in other ways. It has been long felt and acknowledged, and we are aware of the efforts, that have been made in our own state, to obviate it. We have now a statute, Ohio Laws, vol. 42, p. 72, doing away in some degree, with the embarrassing differences between *trespass* and *trespass on the case*. This statute abolishes, in part, the distinction between two leading actions. It is the beginning of the work we propose to finish. Nothing short of what we propose, will entirely remove the evil, and we can see no reason for contenting ourselves with a partial, rather than a complete remedy. (*Report of January 15, 1853, pp. 4, 5.*)

POMEROY. First in importance, underlying the whole system, and from which all others flow as natural consequences, is *the abolition of the distinction between actions at law and suits in equity*. The new procedure is built upon this fact as its very corner-stone; every other characteristic feature of the civil action results from it as a necessary corollary. The interpretation given to this one legislative enactment by the courts of any state must determine the nature of the system which is created therein, whether it shall comply with or disregard the intent

of the law-makers, whether it shall accomplish or defeat the objects of the reform. (*Code Remedies*, § 35.)

ODGERS: The system of pleading introduced by the Judicature Acts is in theory the best and wisest, and indeed the only sensible, system of pleading in civil actions. Each party in turn is required to state the material facts on which he relies; he must also deal specifically with the facts alleged by his opponent, admitting or denying each of them in detail; and thus the matters really in dispute are speedily ascertained and defined.

Forms of action are in fact abolished: it is now no longer necessary to state on the pleadings whether the plaintiff is suing in *trespass* or on the *case*, in *detinue* or in *trover*. This is a most important and most valuable alteration. Formerly, everything turned on the form of action in which the plaintiff elected to sue. If he sued on a money count and it turned out that there was a special contract, he was non-suited, and had to pay the costs of the first action before he could bring another on the special contract.¹ Again, if he sued in *trespass* and *trespass* did not lie, the plaintiff was non-suited, although *trover* or *detinue* would lie. In all the old reports, the form of action is usually stated first in capitals. And the court never decided that *no* action lay on such a set of facts; but only that the action did not lie in that form. There were seven different forms of *personal* actions: debt, covenant, assumpsit, *detinue*, *trespass*, *trespass on the case*, and *replevin*; there were three *real* actions: *dower*, writ of right of *dower*, and *quare impedit*; and one *mixed* action: *ejectment*. And in some cases, it was only by a costly process of elimination that a plaintiff could ascertain for certain what his proper remedy was.

This strictness had undoubted advantages. It taught barristers to be precise. And to this day it affords one of the best means of testing a point of law. Ask a lawyer of the old school whether an action would lie, if one guest at a shooting party shot another by accident through the hedge, there being no negligence on the part of either, and he will approach the question by asking himself, would *trespass* lie? or must the injured man sue in *case*? But it was clearly bad for the suitors, who deserve some consideration, and it has accordingly been abolished. Each party now states the facts on which he relies; and the Court will declare the law arising upon the facts pleaded. (*Principles of Pleading [under the English Judicature Acts]* pp. vii., 150.)

¹ See *White v. The Great Western Railway Co.* (1857), 2 C. B., N. S. 7.

*B. Effect of the Statute in Adjective Law.*I. THE ONE FORM OF ACTION IN THE STEAD OF ACTIONS AT LAW AND
THE SUIT IN EQUITY.

GETTY v. THE HUDSON RIVER RAILROAD COMPANY.

SUPREME COURT OF NEW YORK, SPECIAL TERM, NOVEMBER, 1851.

[6 *How. Pr.* 269.]

This was a motion to set aside an amended complaint. The facts sufficiently appear in the opinion of the court.

Monell, for defendant.

Genet, for plaintiff.

PARKER, JUSTICE.—The defendant seeks to set aside the amended complaint on the ground that it is for a cause of action different from that set forth in the original complaint, and therefore irregular.

The original complaint alleged the construction of a railroad across a bay between the plaintiff's farm and the Hudson River, and claimed damages for thus obstructing the navigation between the farm and the river. The amended complaint not only claims such damages for the injury already suffered by such obstruction, but also seeks indemnity for the future, by praying that the defendants be adjudged and enjoined to construct such a bridge as is required by the fifteenth section of their charter, so as to admit of the passage of plaintiff's boat and vessels between his farm and the river.

The original complaint claimed only legal relief. The amended complaint claims relief both legal and equitable; and it is here contended by the defendant's counsel that they can not both be united in the same action.

The facts set forth in both the complaint and the amended complaint are substantially the same. It is only in the relief prayed that they differ.

We have certainly made but little progress in the reform that has been attempted, if law and equity can now only be administered in separate actions. If such is held to be the present rule of practice, the very object of having law and equity administered in the same tribunal and in the same forms of proceeding will be defeated. It was formerly considered a great evil that in a suit at law the plaintiff could be turned out of court, on the ground that his relief was in chancery; and that where a bill was filed in the Court of Chancery, it might be dismissed, on the ground that the complainant had an ample remedy at law. The evil is still just as great as it was formerly, if a party can have only

legal or equitable relief in the same action. In such case, if he commences his action asking for equitable relief, as for instance a specific performance, and it turns out that he is not entitled to it, but only to legal relief, by way of damages, he might perhaps, if such strictness is to govern, be put to a new action to obtain redress. This certainly ought not to be; and such a strictness is hostile to the whole spirit of the change that has been made. In trying such a cause at the circuit, I should most certainly allow whatever amendment in the pleadings was necessary to give the party redress. If the plaintiff had asked for equitable relief, and it turned out that he was entitled to legal relief only, I should permit him to take it in that form. And if he had asked for legal relief only, when he was entitled to both legal and equitable relief, I should allow the proper amendment to administer complete justice in the case. The power to amend, authorized by the Code, is ample for such purpose. Now the last case of amendment I have mentioned as permissible at the circuit, is precisely what is claimed in this case, with this difference only, that it is claimed to be made here, before issue joined, and when, of course, the defendant has abundant time and opportunity to prepare to meet the claim at the circuit.

I see no objection in this case to uniting claims for both legal and equitable relief in the same action. Both depend on the same transaction and both are necessary to indemnify the plaintiff for past, and to protect him against future injury.

I think the proper course, under our present system of practice, is to give the party whatever relief is applicable to the facts put in issue in the pleadings and established on the trial, whether such relief be legal or equitable, or both. And I see no reason against uniting in one action claims for both legal and equitable relief, when they are not inconsistent with each other.¹ Substantial justice must no longer be sacrificed to mere form and technicality.

It is said that different modes of trials are prescribed for legal and equitable issues. But they are not necessarily to be tried differently, for section 254 of the Code gives ample power to the court to direct that the latter class be tried before the same tribunal, which is prescribed by sections 252 and 253 for the former class. Nor is the distinction at all material; in as much as the court adjudges the relief in all cases, both legal and equitable, on the facts established, whether they were found by the court itself or by a jury.

I think the amended complaint is regular, and the motion must therefore be denied with \$10 costs

¹ *Linden v. Hepburn*, (1850), 5 How. Pr. 188.

CRARY v. GOODMAN.

COURT OF APPEALS OF NEW YORK, MARCH, 1855.

[12 N. Y. 266.]

Action to recover possession of a parcel of land situate in Cattaraugus County, commenced in December, 1848. The cause was tried in January, 1850, before Mr. Justice Hoyt. The plaintiff proved that he had the legal title to the premises in controversy. The defendant proved that he occupied the premises as tenant under one Huntley, and that they were adjacent to other lands owned by the latter; and he alleged in his answer, and offered to prove upon the trial, facts tending to show that the land in dispute was included in the purchase, by Huntley, of the adjacent premises from the plaintiff's grantors, and that by a mutual mistake of the parties, it was not included in the conveyance thereof; and that in equity Huntley was entitled, as against the plaintiff and his grantors, to a conveyance of the premises, the possession of which was in controversy. To this evidence the counsel for the plaintiff objected; and the justice decided that no equitable defence could be interposed in this action to the plaintiff's right to recover upon the legal title, and rejected the evidence; the counsel for the defendant excepted. A verdict was rendered in favor of the plaintiff. From the judgment entered on this verdict the defendant appealed. The case was heard on the appeal at a general term of the Supreme Court in the 8th District, and the judgment affirmed.¹ The defendant appealed to this court. The case was submitted on printed briefs.

Rice & Cobb, for the appellant.

D. R. Wheeler, for the respondent.

JOHNSON, J., delivered the opinion of the court. The principal ground on which this case was disposed of at the trial was, that in an action to recover real property brought under the code of 1848, when the plaintiff's claim is founded upon a legal title, the defendant can not avail himself of an equitable right to defeat that title by way of defence in the suit. This, likewise, was the single ground upon which the judgment at the trial was affirmed at general term.² Although much difference of opinion has existed in the different courts of this state in regard to the effect of the Code of Procedure in this particular, the question has been adjudged in this court;³ and it is now neither necessary nor proper to discuss it. In the case cited, which was an action upon a judgment, the superior court of the City of New York allowed, as a defence to the action, facts which made out a right in the defend-

¹ See 9 Barbour, 657. ² 9 Barb. 657. ³ *Dobson v. Pearce* (1854), 12 N. Y., 156, *infra*, p. 33.

ant to relief upon equitable grounds against the judgment, but which confessedly would not have been available as a defence to the action at law, before the Code. The case arose and was tried in the Superior Court, before the amendments to the code passed in 1852, one of which provides, in express terms, that the defendant may set up as many defences as he has, whether they are such as have been theretofore denominated legal or equitable, or both. This judgment was affirmed in this court upon the ground, that since the enactment of the Code, which in terms abolishes the distinction between actions at law and suits in equity, and prescribes but a single form of civil action, the question in an action is not whether the plaintiff has a legal right or an equitable right, or the defendant a legal or an equitable defence against the plaintiff's claim; but whether, according to the whole law of the land, applicable to the case, the plaintiff makes out the right which he seeks to establish, or the defendant shows that the plaintiff ought not to have the relief sought for.

As the court, upon the defendant's offers of proof, ruled that no equitable defence could be interposed, and in this was, as we have seen, in error, the defendant is entitled to a new trial. We express no opinion whether the defendant did or did not make out by his offer such an equitable defence; because, if his offer was defective, under the distinct ruling of the court, no alteration in its terms or substance would have availed him. The judgment should be reversed and a new trial ordered.

Judgment accordingly.

LORD HANMER *v.* FLIGHT.

COMMON PLEAS DIVISION, HIGH COURT OF JUSTICE, FEBRUARY
12, 1876.

[24 *W. R.* 346.]

This was an appeal from an order made by Archibald, J., at chambers.

The plaintiff is the owner of several small tenements in Church-lane St., Giles'-in-the-Fields, which by an indenture, dated the 26th of September, 1859, he devised to Patrick Mara for a term of thirty-one years at a yearly rental of £105 payable on the usual quarter days. The lease contained covenants to pay the rent, to repair and amend within three months after notice, and to pay all taxes and the costs of all drains and other works executed by order of the Board of Works, and to conform to all the bye-laws of the Board of Works and Acts of Parliament relating to common lodging-houses, etc. About the year 1870 the defendant entered into possession of the premises and paid the rent reserved by the lease up to March, 1874. On the 20th of Sep-

tember, 1875, the plaintiff abandoned the premises, part of them being at that time closed by order of the Board of Works requiring their demolition, and the rest substantially out of repair. The plaintiff sued the defendant as assignee of the lease, averring breaches of all the covenants, and claiming—(1) possession of the said premises; (2) £157 10s. for arrears of rent to September 29, 1875, or for the use and occupation of the premises; (3) £600 damages for the defendant's breaches of covenant above set forth; (4) mesne profits from September 29, 1875, down to the date of the plaintiff's recovering possession.

The defendant in his statement of defence denied that he was assignee of the lease or liable under any of its covenants; but admitted that the lease had been avoided, and that the plaintiff was entitled to re-enter. And he paid into court the sum of £25, and said that that was enough to satisfy the plaintiff's claim in respect of mesne profits. Upon this the plaintiff took out a summons at chambers to strike out some of the paragraphs in the statement of defence, and also claiming judgment for so much of his claim as related to money due for rent or for use and occupation, upon the ground that the statement of defence was silent as to this part of the claim, and therefore admitted that the defendant had been in possession of the premises from 1870 to September, 1875.¹ On the 21st of December, 1875, Master Dodgson amended paragraph 3 of the statement of defence, but refused judgment. On January 26, 1876, Archibald, J., varied this order, giving the plaintiff liberty to sign judgment for £157 10s. arrears of rent to September 29, 1875, and for costs of appeal, and his lordship also amended paragraph 2 of the statement of defence. On the next day the defendant gave notice of appeal to this divisional court.

Beasley, for the defendant now moved the court for a rule rescinding so much of the order of Archibald, J., as varied the order of Master Dodgson.

Bowen, in support for the order.

BRETT, J.—This is one of the cases which show the value of the reforms introduced by the Judicature Act. Formerly, a man who had a substantial right to be paid a sum of money could not recover until he had determined upon a particular form of action, and had established that the circumstances justified an action in that form. But now when a man clearly has an undoubted right to recover the money in some form of action or other, he may at once sign judgment for the amount without staying to determine the precise legal relation on which he stands to the defendant. Objection has been taken to the statement of claim in this case on the ground that it does not disclose in what precise form of action the plaintiff wishes to recover his rent. But it need not do so. Pleadings are now to be merely concise statements of the facts which the party pleading deems material to his case. This statement contains allegations of all the facts that the plaintiff

¹ Ord. 19, r. 17.

deemed necessary to establish his legal rights, but it does not state, and it need not state, what form his legal rights take. That is an inference of law to be drawn by the court from the facts averred on either side. Allegations of fact are made in this statement of claim, and some are denied, and some are not. Those that are not denied are taken as being admitted. And then by Order 14, rule 4, "If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted to be due, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to, or as is admitted to be due." What are the undisputed facts in this case? It is not denied by the defendant that he was in possession of these premises, that he paid rent for them at the rate of £105 a year, up to Lady day, 1874, that he continued in possession of them till September, 1875, but that for that further period he has not paid his rent. Surely, then, judgment may be signed at once for the eighteen months' rent. The defendant can not turn round now and say to the plaintiff, "You are not my landlord." He is estopped from saying so. He must pay his rent as before. Nor are we concerned to inquire in what precise legal relation the defendant stands to the plaintiff, or to Patrick Mara, or to any one else. That may be a necessary inquiry with regard to the want of repair, and the other matters contained in this statement of claim. But, however that may turn out, it is abundantly clear that an action in some form or other must sooner or later have justified this judgment. This is precisely the case contemplated by the statute. The order of my Brother Archibald is quite correct and judgment may be signed forthwith. And this motion must be dismissed with costs.

*Archibald and Lindley, JJ., concurred.*¹

WILLIAMS v. HAYES.

SUPREME COURT OF NEW YORK, RENSSELAER SPECIAL TERM,
JANUARY, 1851.

[5 *How. Pr.* 470.]

Motion to strike out irrevelant and redundant matter. The action was brought to restrain the defendant from foreclosing a mortgage executed by the plaintiff and his wife to one Boughton, and to have the

¹ The ruling in this case was reversed in the Court of Appeal, which was "unanimously of opinion that although the statement of defence did not answer the plaintiff's claim for use and occupation, the facts disclosed in the statement of claim did not support the claim for such use and occupation of the premises, and that under these circumstances the plaintiff was not entitled to sign judgment under Order XIV., r. 4, for the sum claimed in respect of such use and occupation." *Lord Hanmer v. Flight* (1876), 36 L. T. 279.

same cancelled. The complaint states that on the 7th of April, 1838, the plaintiff and his wife mortgaged certain premises to Boughton to secure the payment of \$250; that Boughton died in 1846, and that, before his death, the mortgage had been fully paid; that after the death of Boughton the mortgage came into the possession of the defendant, who claims to be the owner and assignee thereof, and is seeking to foreclose the same. The complaint then proceeds to state that Boughton had in his lifetime publicly stated that the plaintiff had paid up the mortgage, and that he was indebted to the plaintiff; that the only reason why the mortgage had not been legally discharged was, that the parties, being ignorant of the law, had not deemed it necessary; that after the mortgage had come into the possession of the defendant, he had sold it to one Greenman, representing that there was still due thereon \$54; that Greenman having ascertained that the mortgage had been paid and that its payment could be proved, sued the defendant to recover back the amount paid for the mortgage, and before the trial the defendant refunded to Greenman the amount paid by him, and received the mortgage back; that after this the defendant had offered to sell and deliver the mortgage to the plaintiff for \$30, which the plaintiff, to avoid litigation, had agreed to pay, upon condition that the defendant would execute an instrument whereby it might be legally discharged, which the defendant refused to do; that before the death of Boughton he and the plaintiff had, for six years or more, dealt largely together and had not settled; that they were about settling when Boughton died; that the plaintiff has but little property, and if the defendant is permitted to enforce the mortgage, the plaintiff will be left nearly, if not entirely destitute.

All these statements, subsequent to the allegation that the defendant is seeking to foreclose the mortgage, the defendant moved to strike out, as redundant or irrelevant.

E. R. Peck, for plaintiff.

Bingham & McClellan, for defendant.

HARRIS, JUSTICE.—A prominent object of reform instituted by the Code was "*to simplify and abridge pleadings*," to substitute for the unmeaning forms, and prolix statements with which pleadings, both at law and in equity, had been incumbered, a simple statement of the facts which constitute the cause of action, or the grounds of defence, in such a manner as to present to the court the precise points in dispute, and when the controversy is ended, to preserve a record of the precise matters determined. Hence it is specifically required, in respect to all pleadings, that the matter to be alleged shall be stated in "ordinary and concise language." The complaint is to contain "a statement of the facts constituting the cause of action." The answer, besides a denial of the allegations of the complaint, may contain a statement of any new matter constituting a defence. In like manner the reply, in addition to a denial of the statements in the answer, may

contain allegations of new matter, in avoidance of the answer.¹ Whatever statements may be found in either of these pleadings beyond this, are redundant or irrelevant; and this, too, whatever the nature of the action; whether under the system now abolished it would have been a case of legal or equitable cognizance. It was the avowed object of the legislature, in adopting the Code, not only to abolish the distinction between legal and equitable remedies, but to establish an uniform course of proceeding in all cases (see preamble to the Code). Under such a system, neither the rules by which the sufficiency or insufficiency of pleadings in common law courts, nor those which were applicable to pleadings in courts of equitable jurisdiction, can be adopted as a sure guide. The principle by which questions of this description are to be determined under the present system, has been exceedingly well stated by Mr. Justice Selden, in *Knowles v. Gee*.² The facts which pleadings under the Code are to contain are, he says, "issuable facts—facts essential to the cause of action, or defence, and not those facts and circumstances which merely go to establish such essential facts."³ The criterion in every such case is, I think, whether the allegation in question can be made the subject of a *material issue*. If it can, it has a right to be found in the pleadings; if not, it ought not to be there. The rule may be illustrated by the case under consideration. A material fact stated in the complaint is, that the mortgage in question has been paid. Upon this allegation a material issue might be made. Upon this issue, it would be very pertinent to prove another allegation in the complaint, that the mortgagee had in his life time publicly stated that the mortgage was paid. This would be evidence tending to show that the mortgage was in fact paid; but could a material issue be made upon the latter allegation? Whether the mortgagee had said so or not, is only important as it may furnish evidence upon another issue, that is, whether the mortgagee had, in fact, been paid or not. In the language of Justice Selden, "it is a fact which merely goes to establish the essential *fact*," namely, that the mortgagee is really paid. The Code has nowhere provided that evidence, or, which is the same thing, facts which constitute evidence of an essential fact in the case, may be inserted in any pleading. On the contrary it limits pleadings to the statement of such facts as constitute a cause of action or a defence; or, in case of a reply, such facts as will avoid a defence. The learned judge whose doctrine, as stated in *Knowles v. Gee*,⁴ I am so willing to adopt, has, in a more recent case himself laid down a different rule.⁵ In *The Rochester City Bank v. Suydam* he has held that "the statement of facts in the complaint, should be in conformity

¹ Code, §§ 142, 149, 153.

² 4 Howard Pr. 317 (1850).

³ See also *Shaw v. Jaynes*, 4 Howard Pr. 119; *Glenny v. Hitchins*, id. 98; *Russell v. Clapp*, id. 347; *McMurray v. Gifford*, 5 id. 14.

⁴ 4 Howard Pr. 317 (1850).

⁵ Howard Pr. 216 (1851).

with the nature of the action. If the case and relief sought be of an equitable nature then the rules of chancery pleading are to be applied; otherwise those of the common law. With great deference, I am constrained to dissent from this conclusion. It was not the intention of the legislature, in adopting the Code, to continue the distinction between common law and equity pleadings. On the contrary, it was intended that there should be but one system of pleadings. It was not intended that the rules of common law pleading should be applicable to one class of cases, and those of chancery pleading, to another. On the contrary, it was intended that neither the rules of common law pleading, nor those of equity pleading, should be exclusively applicable to any case of pleading under the Code. In every case the criterion, by which to judge of the sufficiency or insufficiency of the pleading, is to be the same. Whether the case is one of an equitable nature, or of common law jurisdiction, so far as the pleading states facts essential to the cause of action, or the defence, or to avoid the matter of the defence, so far it is unobjectionable; whatever else it contains, is redundant or irrelevant, and may properly be stricken out.¹

The motion must be granted with costs.

LE ROY v. MARSHALL.

SUPREME COURT OF NEW YORK, DUTCHESS SPECIAL TERM, JUNE, 1853.

[8 How. Pr. 373.]

The plaintiff having a judgment against Stephen Briggs, Henry Briggs, and Elias Alley, upon which an execution had been returned unsatisfied, brings this action to reach certain property assigned by Stephen, for the benefit of his creditors. It is alleged that the assignment was made to hinder, delay, and defraud creditors, and especially, that it fraudulently provided for the payment of two notes, of \$500 each, given by Stephen to two of his sons, which notes, the complaint avers, were given without consideration.

The answer of all the defendants sets up, among other things, that said Stephen was only surety on the claim upon which the judgment was founded.

The answer also admits the giving of the two notes, and sets forth, particularly and circumstantially, the consideration therefore, which consisted of work and labor performed by the sons for the father, after they had attained lawful age; for which, on a settlement made, the indebtedness was found due. The answer further sets forth, that one of the sons, Stephen D. Briggs, gave his note to the other son, Daniel

¹ Part of the opinion is omitted.

Briggs, to secure him for an indebtedness of \$325, and his liability on a note of \$1,000, to one Wilbur, and that the assignees, in good faith, paid one half of said two \$500 notes, which amount was applied toward the \$325 note, and the Wilbur note.

The plaintiff moves to strike out the portions of the answer above given, on the ground that the same are irrelevant, immaterial or redundant.

J. V. W. Doty, for plaintiff.

H. Angevine, for defendants.

BARCULO, JUSTICE.—The decision of this motion depends upon adopting or rejecting the principle laid down in *Williams v. Hayes*,¹ *Milliken v. Cary*,² and some other kindred cases. That principle requires us to apply the same rules to pleadings in equitable as in legal actions. If we are governed by those cases, this motion must be granted; for it can not be said that the matters complained of deny any material allegations of the complaint, or constitute "a defence or counter claim," within the terms of the Code.

But I apprehend that the cases above referred to do not contain a true exposition of the law on this subject. On the contrary, I find a much more sensible as well as practicable rule, laid down with great clearness and force, by Justice Selden, in *The Rochester City Bank v. Suydam*,³ and *Wooden v. Waffle*.⁴

I am not prepared to deny, that the authors of the Code may have supposed that law and equity could be administered in precisely the same forms; nor that some sections of the Code were designed for that purpose. But every judge knows, and every lawyer should know, that, in practice, the thing is impossible.

Legal and equitable proceedings are essentially different from each other, in their origin, nature, and object. In a common law action the plaintiff presents an absolute right to relief, in the most concise and expressive language. He states his title and nothing more. The defendant also presents his defence with the same certainty and precision. The jury find the disputed facts; and thereupon the law renders a certain judgment. But in a suit in equity none of this rigid logic prevails. The plaintiff may spread out his case more at length, he may accompany it with important circumstances, and set forth the facts more in detail, for he is to make out a case for the conscience of the court; and the particulars of his relief may depend somewhat upon the discretion of the court. So the defendant may meet his case in like manner. A legal claim is a single proposition, which must stand in all its parts or fall. An equitable claim may be composed of numerous independent facts; all of which, or only a portion, may be required to satisfy the court. The one is a chain which is worthless if a single link fail; the other a rope composed of numerous strands, some of which may give way, and yet enough remain to secure some relief. Thus, in an action

¹ 5 How. Pr., 470 (1851). ² 5 id. 272 (1850). ³ 5 How. Pr., 216 (1851). ⁴ 6 How. Pr., 145 (1851).

of ejectment, the plaintiff merely sets forth his title, and avers that the defendant has wrongfully obtained the possession. So in an action at law, upon mutual covenant for the purchase of land, the vendee sets forth the agreement and avers his readiness to perform on the day, and the defendant's failure to perform; and without such readiness to perform on the day, he cannot recover. But in equity he may have relief after the day. In that case he must set forth the circumstances tending to excuse his laches. He may also add the fact, that he has gone into possession, made improvements, made payments, or any other facts showing a part performance, or, bona fide acts, on the strength of the contract. The defendant may also set up in his answer that the property has advanced in price, or that he has prepared to make other dispositions of the land in consequence of the plaintiff's failure to perform; and generally, any circumstances which are calculated to show, that in justice and equity the contract ought not to be enforced. The court then looks through the case and finds a decree upon one or more of these facts as they are alleged and proved. Now it is quite apparent that one of these circumstances which the defendant has a right to put into the case for the consideration of the court, with a view to modifying or affecting its decree, may not come up to the requirements of the Code, as "new matter constituting a defence or counter claim," and therefore, by the strict interpretation of section 153, must be held bad on demurrer. And yet nothing is better settled than that such facts are pleadable in courts of equity; and nothing can be clearer, than that their exclusion would work monstrous injustice.

But it is unnecessary to multiply illustrations. They must be familiar to every lawyer of respectable practice. Indeed, it would be matter of astonishment—if we were permitted to wonder at any thing in this line—that any man, of "common understanding," should have suffered the idea to enter his head, that legal and equitable proceedings could be moulded in the same form, and be measured by the same rules. Every person who has studied and understands the law as a science, knows, that there is *substance* in the distinctions between actions; and that those requirements which superficial observers call "unmeaning forms and prolix statements," were really wise and indispensable safeguards and protections, in administering the most important as well as the most intricate of human sciences.

But it is said that our construction repeals the Code. If this were true, I should deem it not an unpardonable offence. But we do not repeal it. It repeals itself. It has been meddling with a subject not understood; and has come into collision with a "higher law,"—the law of nature—which it can not overcome. For the distinctions which mark law and equity are laid broad and deep in the nature of things. The very origin of the Court of Chancery shows this. It was the impossibility of administering true justice in all cases in the common law forms—the necessity of something more flexible and yielding in its

requirements—which gave birth to equitable courts and equitable proceedings. The distinction is there, and can not be obliterated. For, as Justice Selden truly remarks in *Wooden v. Waffle*,¹ "Nature has made some laws, and these it is difficult to repeal."

If we could be induced to hesitate between our natural desire to follow the Code, and the preservation of the equitable powers of the court, we could find the Constitution pointing out the proper path to choose. That instrument declares, as I understand it, that equity shall be administered by this court. I have already shown that it can not be administered upon legal pleadings; nor upon the pleadings contemplated by the Code; but only upon equitable pleadings as they were in substance at the adoption of the Constitution. Although, some may perhaps consider the Code the highest authority, as it is the latest, I prefer the old fashioned notion of adhering to the Constitution as the safest guide for the present.

The motion is denied, but without costs.

NOTE ON CONSTITUTIONALITY OF A STATUTE ABOLISHING THE DISTINCTION BETWEEN ACTIONS AT LAW AND SUITS IN EQUITY.

This question of the constitutionality of the enactment professing to abolish the distinction between actions at law and suits in equity held a very prominent place in the earlier judicial utterances on the code. The New York constitution of 1846, which had provided for the appointment of a commission "to revise, reform, simplify, and abridge the rules of practice, pleadings, forms, and proceedings of the courts of records of this State"—the commission which framed our earliest code of procedure—had provided also that "the trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever;" that "there shall be a supreme court having general jurisdiction *in law and equity*;" and that "the testimony in equity cases shall be taken in like manner as in cases at law." (N. Y. Const., 1846, Art. I, § 2; Art. VI, §§ 3, 10.) And it was very earnestly insisted, both on and off the bench, that these provisions in effect gave a constitutional sanction to the separate continuance of the two systems of pleading. The constitution itself recognized jurisdiction at law as distinct from jurisdiction in equity and this was sufficient, in the view of many, "to impose upon the power of the legislature the restriction to preserve distinct methods of enforcing legal and equitable rights." To permit both legal and equitable relief to be administered in one suit was certainly—so the argument ran—to destroy the distinction between law and equity, and possibly to imperil trial by jury. Indeed, the clause "there shall be a Supreme Court having general jurisdiction *in law and equity*" was of itself enough, said able judges, to present an insuperable barrier to any legislative merger of the two jurisdictions, yet such merger, it was

¹ 16 How. Pr. 145 (1851).

thought, must in fact occur if the distinctions between actions at law and suits in equity were abrogated. "So long as jurisdiction in equity and at law are kept distinct and courts of justice are permitted to adopt the relief they afford to the facts and circumstances in one class of cases while they are confined to a simple judgment for or against the plaintiff in all others, so long," it was said, "must different rules be applied to pleadings at law and in equity." *Crary v. Goodman*, 9 Barb., 657, 659 (1851); *Rochester City Bank v. Suydam*, 5 How. Pr., 216, 222 (1851); *Wooden v. Waffle*, 6 How. Pr., 145, 149 (1851). Accordingly it was held for a time—to give a single instance—that in an action brought after the adoption of the code to recover possession of land, and founded on a legal title in the plaintiff, an *equitable* right in the defendant to have the land conveyed to him was not a defence, "any more than it was before the code was adopted." *Crary v. Goodman*, 9 Barb. (N. Y.) 657, 662 (1851), reversed in 12 N. Y., 266 (1855).

In other words, the terms "law" and "equity" were supposed to carry with them the modes of procedure peculiar to each; and the distinction between these terms in the constitution, with its insistence upon the right of trial by jury, was supposed to require that these modes of procedure also be kept separate.

The argument against the constitutionality of the section was elaborately presented by Judge Selden in *Reubens v. Joel* (1856), 13 N. Y. 488, 494, although apparently, it was not essential to the decision of that case, and although a majority of the New York Court of Appeals were already taking a different view (See *Dobson v. Pearce* (1854) 12 N. Y. 156; *Crary v. Goodman* (1855) 12 N. Y. 266).

The argument of the Court in Reubens v. Joel.

"Another leading distinction between common law actions and suits in equity," said Judge Selden in *Reubens v. Joel*, "consists in their different modes of trial. The former are to be tried by a jury, the latter by the court. Can the Legislature abolish this distinction? They might, but for the restraints of the Constitution, abolish either kind of trial or re-classify the classes to which they apply: but they can not make trial by jury and trial by the court the same thing. It is plain that the only way in which the declaration contained in section 69, that "there shall be in this State hereafter but one form of action for the enforcement or protection of private rights, and the redress of private wrongs," can be made good, is by abolishing both the form of trial and the mode of relief in one or the other of the two classes of actions. When this is done, and not till then, shall we have one homogeneous form of action for all cases. Has the Legislature power to do this? The Constitution contains the following provisions, viz.: 'There shall be a Supreme Court, having general jurisdiction in law and equity.' (Art. 6, § 3.) 'The Legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and equity

as they have heretofore possessed.' (§ 5.) 'The testimony in equity cases shall be taken in like manner as in cases at law.' (§ 10.) Will it be contended, in the face of these provisions, that the Legislature has power to abolish the jurisdiction of the courts, either at law or in equity? The Constitution gives to the Supreme Court general jurisdiction both in law and equity. Can this be taken away? It authorizes the Legislature to 'alter and regulate' both jurisdictions. Does this mean that it may abrogate them?

"It is, in my judgment, clear that the Legislature has not the constitutional power to reduce all actions to one homogeneous form; because it could only be done by abolishing trial by jury, with its inseparable accompaniment, compensation in damages, which would not only conflict with article 1, section 2, which preserves trial by jury, but would in effect subvert all jurisdiction at law, as all actions would thereby be rendered equitable; or, by abolishing trial by the court, with its appropriate incident, specific relief, which would destroy all equity jurisdiction and convert every suit into an action at law.

"If we recur to the proceedings of the convention which framed the Constitution, all doubts as to its true construction in this respect will be removed. The committee on the judiciary reported on the 1st day of August, and that report, section 3, providing for a Supreme Court, reads as follows: 'There shall be a Supreme Court, having the same jurisdiction in law and equity which the Supreme Court and Court of Chancery now have, subject to regulation by law.' On the tenth day of August, a member moved to add to the report the following: 'And to the end that ultimately the jurisdiction of law and equity may not be separately administered, and that the two may be blended into one harmonious system, the Legislature shall provide by law, as far as may be, a common form of procedure for remedies arising under both jurisdictions.' This proposition was afterward modified so as to read: 'The Legislature shall provide by law for a uniform system of procedure in the administration of justice in civil cases, without regard to the distinctions heretofore had between different forms of actions and different jurisdictions in law and equity.' After a week's debate upon this and kindred propositions, calling forth most of the eminent legal talent and learning in the convention, all the propositions looking to a blending of the modes of proceeding in the two jurisdictions were rejected, and the section was adopted as it now stands in the Constitution. (Vide *Debates in Conv.*, Atlas ed., 481-582.) Thus, it will be seen that section 69 of the Code is an attempt to exercise a power which the convention, in framing the Constitution, expressly refused to confer upon the Legislature."

"In the case of *Parsons v. Bedford et al* (3 Pet. 433), the Supreme Court of the United States put a construction upon that clause in our National Constitution (Art. 3, § 2) which declares: 'That the judicial power shall extend to all cases in law and equity arising under the

Constitution, the laws of the United States, and treaties made or which shall be made under their authority,' etc., taken in connection with the 7th amendment, which provides that 'In suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved; and no fact once tried by a jury shall be otherwise re-examinable in any court of the United States than according to the rules of the common law.' The Legislature of Louisiana had enacted 'That when any cause shall be submitted to a jury to be tried, the verbal evidence shall in all cases, where an appeal lies to the Supreme Court, if either party require it, and at the time when the witnesses shall be examined, be taken down in writing by the clerk of the court, in order to be sent up to the Supreme Court, to serve as a statement of facts in case of appeal.' And by a law of the United States, passed the 26th of May, 1824, the mode of practice pursued in the courts of Louisiana is directed to be followed in the courts of the United States in that State. Upon the trial of the cause in the United States District Court, before a jury, it being a common-law action to recover a debt, the defendant applied to the court to have the testimony taken down pursuant to the statute and the practice in that State, with a view to an appeal, which the judge refused, upon the ground, as it would seem, that it was a common-law action, and the facts could not be reviewed. Upon writ of error to the Supreme Court, it was argued for the plaintiff in error that there was no distinction between law and equity in the State of Louisiana; and that if that distinction was recognized in the United States Court, in proceedings in that State, it would become necessary to introduce the forms of the common law there, which would be productive of great inconvenience. But the court held that the distinction, being recognized in the Constitution, could not be abolished by State legislation, nor disregarded by the courts. Judge Story says: 'The Constitution has declared, in the 3d article, that the judicial power shall extend to all cases in law and equity,' etc. 'It is well known that in civil causes, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases, to inform the conscience of the court. When therefore, we find that the amendment requires that the right of trial by jury shall be preserved, in suits at *common law*, the natural conclusion is, that this distinction was present to the minds of the framers of this amendment. By *common law*, they meant what the Constitution denominated in the 3d article "law"; not merely suits which the common law recognized among its old and settled proceedings, but suits in which *legal rights* were to be ascertained and determined, in contradistinction to those where *equitable rights* alone were recognized and equitable remedies were administered.' This case is a direct authority to show what, indeed, is plain without authority, that the Constitution, by conferring jurisdiction in 'law and equity,' has not only recognized the distinction between them, but placed that dis-

tion beyond the power of the Legislature to abolish ; which, as has been shown, it could only do by abolishing one or the other of the two jurisdictions."

Influence of the doctrine elsewhere.

The earnestness with which the argument against the constitutionality of the provision was pressed in New York had a wide influence. Eventually the New York Court of Appeals and the courts of the other code states discarded the doctrine, but not until it had produced a notable departure from the general plan of framing the codes ; for in the earlier codes of Kentucky, Iowa, Minnesota, Oregon, Nebraska, Arkansas, and Wyoming an attempt was made to preserve the formal distinction in procedure between actions at law and suits in equity (See Hepburn's *Hist. Devel. of Co. Pl.* §§ 93, 94, 96, 100, 102, 114, 115, 142.) The distinction still endures in Kentucky, Iowa, Oregon, and Arkansas ; but with the possible exception of Oregon, its effect, as construed by the courts, appears to go little beyond the customary distribution of cases between two trial dockets, for the jury and for the court.

It is to be observed however that the unconstitutionality of an enactment abolishing the historic distinction between actions at law and suits in equity is still a favorite *dictum* in the federal courts. Long after the contention had been abandoned in the code states, Judge Hammond, delivering the opinion in *Whittenton Co. v. Memphis Co.* (1883), 19 Fed. Rep. 273, 275, thus sums up the doctrine of the United States Courts on the point : "In whatever form the subject has presented itself,—whether as a matter of jurisdiction, pleading, or practice, as to methods of relief, defences, review, or what not,—the supreme and inferior federal courts have, with inexorable firmness, insisted upon preserving the *essential* distinctions between law and equity by administering them separately, as required by the constitution and laws of the United States. The cases are far too numerous for citation here, but will be gathered in a foot-note for consultation in support of this opinion. They commence with the organization of the courts, and are to be found in almost every volume of the reported decisions. It is a distinction that inheres in the system by virtue of constitutional commands, and it will be found upon close observation that the federal constitution has protected the right of trial by jury in a manner that imposes restrictions upon legislative power more effectual, perhaps, than those found in many of the state constitutions. It necessarily results from the requirement that, in all controversies of legal cognizance, there shall be preserved a right of trial by jury, and that no fact so tried shall be re-examined in any court otherwise than according to the rules of the common law, that the original trial shall be likewise according to those rules in all essential and substantial particulars. Merely taking the verdict of 12 men, no matter how, is not, in the sense of our federal constitution, a trial by jury ; and it is impractica-

ble, as well as impossible, to conduct the original trial according to rules unknown to the common law, and in subversion of them, and then, on re-examination by writ of error in an appellate jurisdiction, or, it may be, on motion for new trial, or otherwise, in the tribunal of first instance, to obey this mandate of the constitution, and conduct those proceedings 'according to the rules of the common law'. Const. U. S. Amend. 7. The whole proceeding, from beginning to end, must be, *ex necessitate rei*, a common-law proceeding; not necessarily according to the precise forms of the common-law,—reformation in procedure being open to legislation,—but always there must be a trial substantially according to the course of the common law.

"Now, this consideration alone has convinced me, aside from all others, that when parties bring their '*suits at common law*' from a state court of equity, where, by state legislation, they have been permitted to conduct them under the forms of procedure known to those courts in ancient times, into this court, they must, in the nature of the case, by repleading, convert their 'bills,' exhibits, disclaimers, *pro confessor*s, answers, cross-bills, pleas, replications, petitions, affidavits, *jurats*, and the like into declarations and pleas according to the forms for trials of suits at common law prevailing, not only in this court, but as well in the law courts of the state of Tennessee. Even in the state court of equity, from which this suit comes, when a jury is demanded, as it may be, the trial is not on the bill, answer, etc., but, by statute, the parties are required to make up their issues in a separate writing for the jury, which is, in effect, what we require them to do here by repleading. Manifestly, that method of sifting out the issues to be tried is not open to this court, and it can only be accomplished by repleading.

"It matters not that this may result in two or more separate suits, with some at law and some in equity. This comes from state legislation allowing the parties to litigate their several controversies in one suit, a method forbidden to this court, which must administer law and equity separately. If the parties deem this an advantage they should remain in the state court where it can be done. Nor is it practicable to have a different rule for a suit which is removed when the 'bill' only has been filed, from one which is brought here at some later stage. It would be a hybrid proceeding, producing confusion, if not disadvantage, to the defendant, to allow the plaintiff to use an elaborate and voluminous 'bill' as the vehicle for his case and confine the defendant to the simple form of a plea at law."

WRIGHT *v.* HOOKER.

COURT OF APPEALS OF NEW YORK, APRIL, 1854.

[10 *N. Y.* 15.]

On April 16, 1849, Benjamin Isaacs & Co., of Oswego, New York, entered with an agreement with James H. Hooker, of Troy, New York, for running a line of boats upon the Erie and Oswego Canals, during the navigable season of 1849. No general partnership name being adopted, the business of the concern was done at Oswego in the name of B. Isaacs & Co., and at Troy in the name of James H. Hooker.

In August, 1849, B. Isaacs & Co. drew upon Hooker a bill in the following terms :

\$1000.

OSWEGO, 7th August, 1849.

"Thirty days after date please pay to the order of B. Isaacs & Co., one thousand dollars, value received, and charge the same to the account of ch'gs.

"To James H. Hooker, Troy, N. Y."

"B. ISAACS & Co."

This bill was endorsed by the payees and discounted by the plaintiff. B. Isaacs & Co. received the avails, with which they purchased corn on account of the partnership, which was forwarded to and received and sold by Hooker, who refused, however, to accept the bill. The plaintiff brought this action in March, 1850, against the Isaacs and Hooker jointly, to recover the amount of the bill or the money advanced upon it. There were special counts stating the foregoing facts, but not directly charging Hooker as a drawer of the bill, and also counts for money lent by the plaintiff to the defendants. Hooker alone defended; and the cause was brought to trial at the Oswego circuit in June, 1850, before Mr. Justice Allen, a jury being waived. The judge held that Hooker was "liable as *drawer* upon the bill in suit," and on that ground gave judgment for the plaintiff for the whole amount of it. The supreme court in the fifth district affirmed this judgment at general term, Pratt, J., delivering the opinion, in which it was held that the circuit judge erred in the ground upon which his judgment was based, but that the defendant was liable for money lent. Hooker appealed to this court, and the cause was argued here by,

H. P. Hunt, for the appellant, and

George F. Comstock, for the respondent.¹

EDWARDS, J. "It is contended, however, that there is not sufficient stated in the complaint to authorize the court to hold the defendant Hooker liable as one of the drawers of the bill. The Code of Procedure requires that the complaint shall contain a statement of the facts con-

¹ The statement of the case has been abridged.

² Part of the opinion discussing the business relations between Hooker and Isaacs & Co., as shown in the bill of exceptions, is omitted.

stituting the cause of action. In this case it is stated that all the defendants were purchasers; that Isaacs & Co. conducted the business of the partnership at Oswego in their names; that as parties they bought a large quantity of corn for the benefit of the firm, and drew a draft upon Hooker, in the name of Isaacs & Co., for the firm, which the plaintiff discounted, and that Hooker received the corn purchased by means of the discount, and that it was sold and disposed of by him. I think that these allegations are sufficient to sustain the judgment of the court that Hooker became liable as one of the drawers of the bill in suit. It is true that it would appear that the person who drew the complaint contemplated that Hooker would be held liable in some other capacity. But that is immaterial. The very object of the new system of pleading was to enable the court to give judgment according to the facts stated and proved, without reference to the form used or to the legal conclusions adopted by the pleader.¹

The judgment should be affirmed.

DOBSON v. PEARCE.

COURT OF APPEALS OF NEW YORK, DECEMBER, 1854.

[12 N. Y. 156.]

The action was commenced in the New-York superior court, on the 26th of September, 1850. The complaint was upon a judgment for \$612.93, recovered in that court in April, 1846, in favor of one Olney against Pearce, the defendant in this suit, alleging an assignment

¹ As bearing on the change in this from the older system of pleading see the remarks of EDMONDS J. in *Dollner v. Gibson*, (1850), 3 Code Rep. (N. Y.) 153: "One principle that lay at the foundation of our [common law] system of pleading—and the system was as admirable for its perfection as it was venerable for its age—was, that it was the *legal effect* of facts, and not the facts themselves, which were to be pleaded. The pleader did not set out all the circumstances by which he expected to establish his claim—all his *probative facts*, as they have not inaptly been termed, but only the *legal conclusion* which was properly deducible from them.

For instance—a man lent his horse to one who refused to return him on demand. If the owner sought to recover him back specifically in replevin, he would plead merely that the borrower wrongfully detained his horse. If he sought to recover damages in trover, he would plead that he lost his horse and the borrower had found him, and had appropriated him to his own use; and if he sought to recover the value of his horse in *assumpsit*, he would plead that he had sold and delivered him.

So in an action against an endorser of a promissory note, who had waived protest, the pleader would not set out the waiver, but he would plead a protest, for such was the legal effect of the waiver.

So also on a sale and delivery of goods, even where there was no express promise to pay for them, a promise was also always pleaded, for that was the very foundation of the action, and was the legal effect of the fact of a sale, and the sale and delivery were pleaded merely as the consideration of the promise.

So, too, where a man did an act by another as his agent, the act was always pleaded as the act of the principal himself, for such was the legal effect of what was actually done.

thereof from Olney to Dobson, the plaintiff, just previous to the commencement of the action.

The defendant by his answer alleged that the judgment was entered in a suit commenced against him, in favor of Olney, by the service of a *capias* upon him in February,* 1846, when he was casually in New-York, he then and ever after having been a resident of Connecticut; that Olney had no just or legal demand against him, when the *capias* was served, and that he was induced by fraudulent representations and assurances of Olney, made to him after the *capias* was served, and upon which he relied, to the effect that no further proceedings would be taken in the suit, not to appear therein; and that afterwards Olney fraudulently and without the knowledge of the defendant procured the judgment mentioned in the complaint to be entered in the suit upon a false and unfounded claim, and known so to be by Olney at the time; that in 1848 Olney commenced an action of debt on the judgment, against the defendant, in the superior court of the State of Connecticut. Thereupon the defendant commenced a suit in chancery against Olney, before the same court in Connecticut, alleging that the judgment was procured to be entered by fraud on the part of Olney, and praying the court to perpetually enjoin him from further prosecuting it. Olney appeared in and defended the chancery suit by attorney; and on the 10th of September, 1850, a decree was made therein, declaring the judgment fraudulent and perpetually enjoining Olney from further prosecuting the action upon it; that in submission to this decree the action upon the judgment in the superior court of Connecticut was discontinued; and that the pretended assignment to plaintiff was made after the decree and with full knowledge of it and of the fraud in procuring the judgment. The plaintiff replied, denying the allegations in the answer.

This suit was tried first in 1851, when a verdict was rendered in favor of the plaintiff; this was set aside and a new trial ordered.¹

On a second trial, in 1853, the court directed the complaint to be dismissed; this was set aside and a third trial ordered. The third trial was had before Justice Duer and a jury, in 1853. On this trial the plaintiff proved the judgment described in the complaint, and the assignment thereof by Olney to the plaintiff, on the 11th of September, 1850, and rested.

The defendant offered in evidence a duly authenticated copy of the record of the proceedings in the suit in chancery in the superior court of Connecticut, mentioned in the answer. The counsel for the plaintiff objected to it as evidence; the objection was overruled and the same received and read in evidence, and plaintiff's counsel excepted. From this record it appeared that Pearce commenced a suit in chancery against Olney in the superior court of Connecticut, in 1849, and in the bill or petition for relief he stated the entry of the judgment against

¹ See 1 Duer, 142.

him in the superior court of New York, and alleged that there was no just or legal demand against him in the suit in which it was entered, that he was prevented from appearing in that suit by the fraudulent representations and assurances of Olney, detailing them, and that the judgment was procured to be entered by fraud on the part of Olney; that Olney had commenced an action of debt against him on the judgment in the superior court of Connecticut, which was pending; and prayed relief. Olney appeared in and defended the chancery suit, by George Perkins, Esq., an attorney. It was referred to a committee to hear evidence and report the facts. At the March term of the court, in 1850, the cause was heard on the report of the committee and objections made thereto by the counsel of Olney, and thereupon the court at that term found, from the facts stated in the report of the committee, that the material allegations in the bill were true; and afterwards, at a term of the court held on the second Tuesday of September, 1850, a decree was made by which the material facts stated in the bill were declared to be true, and Olney was enjoined from prosecuting his action of debt upon the judgment under a penalty of one thousand dollars, and adjudged to pay the costs of the chancery suit.

The counsel for the defendant read in evidence a duly authenticated copy of the record of the proceedings in the action of debt on the judgment rendered in the New York superior court, commenced by Olney in the superior court of Connecticut. To the admission of this record in evidence the counsel for the plaintiff duly objected; the objection was overruled and he excepted. By this record it appeared that the action was commenced in November, 1848, and prosecuted by George Perkins, Esq., as attorney for Olney; that Pearce appeared therein, and that on the 8th of April, 1850, the suit was discontinued with the leave of the court. The counsel for the defendant further proved that the judgment mentioned in the records of the proceedings in the suit at law, and the chancery suit prosecuted in the superior court of Connecticut, was the same judgment mentioned in the complaint herein; and that the suit at law as discontinued after the committee appointed in the chancery suit had reported the facts to the court and notice thereof had been served on the attorney of Olney. It was further proved that the assignment to the plaintiff was after the final decree in the chancery suit had been made, and after notice of it to Olney and the plaintiff. The justice before whom the cause was tried instructed the jury that the record of the proceedings, finding and decree of the superior court of Connecticut in the chancery suit, was conclusive evidence against the plaintiff to sustain the allegations in the defendant's answer, if the jury found that Olney appeared in that suit by an attorney who was authorized by him to do so; that if the jury did not so find, then this record did not affect the plaintiff. The counsel for the plaintiff excepted to such instructions. The jury rendered a verdict in favor of the defend-

ant. The judgment rendered on this verdict was affirmed at a general term of the superior court. The plaintiff appealed to this court.

E. Terry, for the appellant.

Asa Child, for the respondent.

W. F. ALLEN, J.—A judgment rendered by a court of competent jurisdiction can not be impeached collaterally for error or irregularity, but is conclusive until set aside or reversed by the same court or some other court having appellate jurisdiction.¹ The jurisdiction of the court in which a judgment has been recovered is, however, always open to inquiry; and if it has exceeded its jurisdiction, or has not acquired jurisdiction of the parties by the due service of process or by a voluntary appearance, the proceedings are *coram non judice* and the judgment void. The want of jurisdiction has always been held to be a valid defence to an action upon the judgment, and a good answer to it when set up for any purpose.

So, fraud and imposition invalidate a judgment, as they do all acts; and it is not without semblance of authority that it has been suggested that at law the fraud may be alleged, whenever the party seeks to avail himself of the results of his own fraudulent conduct by setting up the judgment, the fruit of his fraud.² But whether this be so or not, it is unquestionable that a court of chancery has power to grant relief against judgments when obtained by fraud. Any fact which clearly proves it to be against the conscience to execute a judgment, and of which the injured party could not avail himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an interference by a court of equity.³

Under our present judiciary system, the functions of the courts of common law and of chancery are united in the same court, and the distinctions between actions at law and suits in equity, and the forms of all such actions and suits, are abolished, and the defendant may set forth by answer as many defences as he may have, whether they be such as have been heretofore denominated legal or equitable, or both.⁴ The Code also authorizes affirmative relief to be given to a defendant in an action by the judgment.⁵ The intent of the legislature is very clear, that all controversies respecting the subject matter of the litigation should be determined in one action, and the provisions are adapted to give effect to that intent. Whether, therefore, fraud or imposition in the recovery of a judgment could heretofore have been alleged against it collaterally at law or not, it may now be set up as an equitable defence to defeat a recovery upon it. Under the head of equitable

¹ *Smith v. Lewis*, 3 J. R., 157; *Homer v. Field*, 1 Pick., 435.

² See per Thompson, C. J., in *Borden v. Fitch*, 15 J. R., 121, and cases cited.

³ *Reigel v. Wood*, 1 J. C. R., 402; *McDonald v. Neilson*, 2 Cow. Rep., 139; *Duncan v. Lyon*, 3 J. C. R., 351; *Marine Ins. Co. of Alexandria v. Hodgson*, 6 Cranch, 206; *Shottenkirk v. Wheeler*, 3 J. C. R., 275.

⁴ Code, §§ 69, 150.

⁵ § 274.

defences are included all matters which would before have authorized an application to the court of chancery for relief against a legal liability, but which, at law could not have been pleaded in bar. The facts alleged by way of defence in this action would have been good cause for relief against the judgment in a court of chancery; and under our present system are, therefore, proper matters of defence; and there was no necessity or propriety for a resort to a separate action to vacate the judgment. In Connecticut, although law and equity are administered by the same judges, still the distinction between these systems is preserved, and justice is administered under the head of common law and chancery jurisdiction by distinct and appropriate forms of procedure; and hence, as it was at least doubtful whether at law the fraud alleged would bar a recovery upon the judgment, a resort to the chancery powers of the court of that state was proper if not necessary.

The right of the plaintiff in the judgment was a personal right and followed his person; and, aside from the fact that he had resorted to the courts of Connecticut to enforce his claim under the judgment, the courts of that state, having obtained jurisdiction of his person by the due service of process within the state, had full power to pronounce upon the rights of the parties in respect to the judgment and to decree concerning it. It necessarily follows that the decree of the superior court of Connecticut, sitting as a court of chancery, directly upon the question of fraud, is conclusive upon the parties to that litigation and all persons claiming under them with notice of the adjudication. The judgment of a court of competent jurisdiction upon a point litigated between the parties, is conclusive in all subsequent controversies where the same point comes again in question between the same parties.¹

In the State of Connecticut, it is quite clear the question of fraud would not be an open question between the parties, but would be considered entirely settled by the decree of the court of that state; and as full faith and credit are to be given by each state to the judicial proceeding of every other state, that is, the same credit, validity, and effect as they would have in the state in which they were had, the parties are concluded in the courts of this state by the judgment of the court in Connecticut upon the question in issue.² The decree of the court of chancery of the State of Connecticut as an operative decree, so far as it enjoined and restrained the parties, had and has no extra-territorial efficacy, as an injunction does not affect the courts of this state; but the judgment of the court upon the matters litigated is conclusive upon the parties everywhere and in every forum where the same matters are drawn in question. It is not the particular relief which was granted which affects the parties litigating in the courts of this state; but it is the adjudication and determination of the facts by that court, the final decision that the judgment was procured by fraud, which is operative

¹ *White v. Coatsworth*, 2 Seld., 137; *Embury v. Conner*, 3 Comst., 522.

² *Hampton v. McConnell*, 3 Wheat., 234.

here and necessarily prevents the plaintiff from asserting any claim under it. The court acquired jurisdiction of the parties by the commencement of the action, and the service of the process upon the defendant therein, and his appearance by an authorized attorney; and the withdrawal of the action of debt upon the judgment did not deprive it of jurisdiction thus acquired.

The judgment of the superior court must be affirmed with costs.¹

PHILLIPS *v.* GORHAM.

COURT OF APPEALS OF NEW YORK, JUNE, 1858.

[17 *N. Y.* 270.]

Appeal from a judgment of the Supreme Court in favor of the plaintiff in an action to recover the possession of certain land, and also granting relief to the plaintiff on the ground of fraud and undue influence against a deed under which the defendant claimed title.

B. F. Rexford, for appellant.

Albert N. Sheldon, for respondent.

JOHNSON, CH. J. In this case the question arises whether, in an action to recover specific real property, the plaintiff may attack a deed under which the defendant claims title as well upon grounds which, under the former divided jurisdictions of law and equity, were cognizable at law as upon grounds which were properly cognizable in the Court of Chancery. It is contended that the Legislature does not, under the Constitution of 1846, possess the power to authorize such a case to be determined in a single suit. The provisions relied upon are sections 3 and 10 of article 6, the first of which is: "There shall be a Supreme Court having general jurisdiction in law and equity;" and the other is: "The testimony in equity cases shall be taken in like manner as in cases at law." The argument based upon these provisions is, that distinct jurisdictions at law and equity are recognized, and that this

¹ Johnson, J., delivered a concurring opinion, and remarked: "Giving to the plaintiff's objection to the admission of the record the broadest effect, the first question is whether the defence set up by the answer was available. That defence is, in substance, that the judgment sued upon was fraudulently entered up after assurances, on behalf of the plaintiff in that suit to the defendant, that no further proceedings should be taken in it without notice to him, whereby he was induced not to take steps to interpose a defence, which in point of fact he could successfully have maintained."

"Relief against such a judgment, upon these facts, would have been within the power of a court of equity in this state, upon a bill for that purpose." 2 Story's Eq. Jur., §§ 887, 896; *Huggins v. King*, 3 Barb., 616.

The Code, § 69, having abolished the distinction between actions at law, and suits in equity, and the forms of all such actions as theretofore existed, an equitable defence to a civil action is now as available as a legal defence. The question now is, ought the plaintiff to recover; and anything which shows that he ought not is available to the defendant, whether it was formerly of equitable or legal cognizance.

recognition imposes upon the power of the Legislature the restriction to preserve distinct methods or enforcing legal and equitable rights. The language of the provisions does not, as it seems to me, either directly or by any implication, lead to the result contended for. The supreme original civil jurisdiction at law, was, under the preceding Constitution, in the Supreme Court; the equitable jurisdiction was in the Court of Chancery. The new Constitution conferred the whole jurisdiction upon a single court. The subject to be acted upon was the vesting of judicial authority, not the regulating of judicial procedure. This judicial authority had existed in two distinct branches and both are named with the purpose of conferring both upon the new Supreme Court. The 5th section of the same article likewise shows that the Legislature were to possess this power. It declares that the Legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and equity as they have heretofore possessed. The former Constitution contained two clauses limiting the legislative power on this subject; one was, that no new courts should be created not proceeding according to the course of the common law, except the equity courts authorized in the Constitution; the other was, that trial by jury, in all cases in which it had been heretofore used, should remain inviolate. The latter of these provisions is contained in the present Constitution and does take away the power of the Legislature to prescribe any other than a jury trial in cases in which that mode of trial was used at the period to which the Constitution refers. But there was nothing in either Constitution which prevented the Legislature from imposing the necessity of the jury trial in all cases. Nor is there any doubt that under the former Constitution the procedure in equity could have been brought to a conformity with the proceedings in the law courts. The Legislature might at any time have changed the subpoena to answer into a writ upon the case, the bill into a declaration, the answer into a plea in bar, and have compelled a trial by jury in all cases. The question is not whether such a change would have been wise, having regard to the great degree of ease and certainty in procedure which had been attained by the experience of many years, and to the difficulty of substituting a new and untried practice, but it is only one of power, and upon that question no doubt could have existed.

The provision as to the taking of testimony is, in substance, only that a single method of taking testimony should exist. Examiners in Chancery, and the old method of taking testimony before them, were to be abolished, and one mode was thereafter to exist in both classes of cases. This being plainly the purpose of the provision, and the subject which the Constitution had in view in the section in question, it would comport with no just rules of construction to found upon the terms selected to express that purpose—they being those which the former practice had rendered perfectly familiar and, therefore, appropriate—an implication so important as that equity cases and law cases

were always to be preserved distinct from each other and were not to be administered in a single suit.

If the Constitution has not deprived the Legislature of the power, and clearly, as I think, it has not, the next question is whether the code of procedure authorizes a suit for both legal and equitable relief. The recital which precedes the detailed provisions of the code declares it to be expedient "that the distinction between legal and equitable remedies should no longer continue, and that a uniform course of proceeding, in all cases, should be established." Following up this recital, section 62 enacts that "the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this state hereafter but one form of action, for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action." If no further provisions were contained in the code bearing upon the question it would be difficult to arrive at the conclusion that one who attempted to recover a piece of land of another, on an equitable and also on a legal ground, must bring a separate action to set up each ground of recovery. But the further provisions bearing upon the subject leave no room to contend that such is the law. So far as substance is concerned, a complaint needs only to contain facts constituting a cause of action, recognizing no distinction of causes of action into legal or equitable.¹ Among the causes of demurrer, the 5th only can have reference to a defect of the nature of that alleged to exist in this case "that several causes of action have been improperly united"² though that refers as I think to causes of action for separate things and not to claims to a single thing on legal and also on equitable grounds. But even if separate things were claimed in the same suit, one on legal and another on equitable grounds, it would create no objection to the joinder; for section 167 expressly provides that the plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable or both where they arise out of:

1. The same transaction or transactions connected with the same subject of action; or:

5. Claims to recover real property, with or without damages, and rents and profits.

Either of these subdivisions is broad enough for this case. The same policy is embodied in section 150, which provided that the defendant may set forth by answer as many defences and counter claims as he may have; whether they be such as have heretofore been denominated legal or equitable or both. Indeed the principle has been settled in this court that an equitable defence could be interposed to a legal claim³ and all the inconvenience which is alleged as an argument against allowing legal and equitable grounds of claims to be united in a complaint,

¹ § 142.

² § 144.

³ *Dobson v. Pearce*, 12 N. Y., 156; *Crary v. Goodman*, id. 266.

equally exists against allowing an equitable answer to a legal claim. In truth the plain answer to both objections is, that the law so wills it; and we are bound to believe, at least to hope, that the inconvenience will not prove in practice to be so great as has been anticipated. It is objected that one ground of claim is triable by jury and the other by the court; but all cases may legally be tried by a jury, so that this creates no insuperable difficulty.

If these views are correct, then the objection is reduced to one of mere variance, and within the settled rules on that subject created no bar to a recovery. The ground was clearly understood, no one was surprised or misled, the parties went to trial prepared to try, and did try, the very question on which their rights depended. If there was any defect of parties, or if the defendant was entitled to any restitution, he should have presented his claim at the trial and it would then have been, as we must presume, properly disposed of.

The judgment should be affirmed.¹

COLE v. REYNOLDS.

COURT OF APPEALS OF NEW YORK, SEPTEMBER, 1855.

[18 N. Y. 74.]

Appeal from the Supreme Court. The action was brought by David D. Cole and Lemuel C. Holmes. The complaint averred that the plaintiffs and Wightman J. Cole, one of the defendants, were co-partners under the firm of Coles & Holmes; that the defendants were also co-partners, doing business as commission merchants, in the city of New York, under the firm of Cole, Stevens & Co.; that there were large dealings between the two firms; that the defendants became and were indebted to the plaintiffs and Wightman J. Cole, upon an account which had accrued in favor of the firm of Coles & Holmes, and against the firm of Cole, Stevens & Co., arising, among other things, from the receipt by the latter of the proceeds of property, to the amount and value of \$18,005.33, transmitted to them for sale, on commission, by the former, and that the defendants were indebted to the firm of Coles & Holmes, upon said account, in the sum of \$2,316.45, with interest from February 4, 1853, over and above all discounts, payments and set-offs on the part of the defendants. It further stated that Wightman J. Cole, one of the partners in both firms, had refused to be joined as a plaintiff in the action, and therefore he had been made defendant only.²

¹ Selden and Pratt, JJ., dissented; Comstock, J., expressed no opinion; the other judges concurred. Cf. *New York Ice Company v. Northwestern Insurance Company* (1861), 23 N. Y. 357, 360, where Comstock, C. J., gives the reason for his reticence in *Phillips v. Gorham*.

² Part of the reporter's statement of the case is omitted.

James Gibson, for the appellants.

Potter & Tanner, for the respondents.

HARRIS, J.—By the Code, the distinction between actions at law and suits in equity is abolished. The course of proceeding in both classes of cases is now the same. Whether the action depend upon legal principles or equitable, it is still a civil action, to be commenced and prosecuted without reference to this distinction.

But, while this is so in reference to the form and course of proceeding in the action, the principles, by which the rights of the parties are to be determined, remain unchanged. The Code has given no new cause of action.

In some cases parties are allowed to maintain an action who could not have maintained it before, but in no case can such an action be maintained where no action at all could have been maintained before upon the same state of facts. If, under the former system, a given state of facts would have entitled a party to a decree in equity in his favor, the same state of facts now, in an action prosecuted in the manner prescribed by the Code, will entitle him to a judgment to the same effect. If the facts are such as that, at the common law, the party would have been entitled to judgment, he will, by proceeding as the Code requires, obtain the same judgment. The question therefore, is whether, in the case now under consideration, the facts, as they are assumed to be, would, before the adoption of the Code, have sustained an action at law or suit in equity.

The defendants' firm are indebted to the plaintiffs' firm upon an account stated and settled between them. This fact, standing alone, would have entitled the plaintiffs to maintain an action at law. But there is another fact in the case, which, upon a technical rule peculiar to the common law, would have defeated such an action. One of the individuals composing the plaintiffs' firm is also a member of the defendants' firm. A man can not sue himself; and as, at common law, all the members of a firm must unite in bringing an action, it follows that in such a case no action at law could be sustained.

But in equity this technicality does not stand in the way of justice. It is enough, there, that the proper parties are before the court. They may be plaintiffs or defendants according to circumstances, but, being before the court, it will proceed to pronounce such judgment as the facts of the case require. This latter rule is obviously the dictate of common sense. So far as I know, it prevails everywhere else except at the common law.

Indeed, equity, like the law of Scotland and the systems of continental Europe, goes farther, and treats the copartnership as a distinct existence, having its own distinct rights and interests. "In all such cases," says *Story*, "courts of equity look behind the form of the transactions to their substance, and treat the different firms, for the

purposes of substantial justice, exactly as if they were composed of strangers, or were in fact corporate companies."¹

There is no difficulty, therefore, growing out of the fact that one of the parties is a member of both firms, in sustaining this action.²

The judgment should be reversed and a new trial ordered, with costs to abide the event.³

Judgment reversed and new trial ordered.

GRAIN v. ALDRICH.

SUPREME COURT OF CALIFORNIA. OCTOBER, 1869.

[38 Cal. 514.]

The case came up on a demurrer to the complaint.

SANDERSON, J., delivered the opinion of the court: The plaintiffs, as agents for the Bank of British North America, sue to recover of the defendants, formerly engaged in business in Honolulu, under the name of Aldrich, Walker & Co., the aggregate sum of \$132,236.25.

The complaint contains three counts, in each of which the same claim is stated in different modes. The facts, however, are, that the defendants were indebted to the firm of Charles W. Brooks & Co. in the sum of \$159,000 and upwards; that Brooks & Co. sold and assigned a part of said indebtedness, to wit, the sum of \$44,078, to the plaintiffs, of which assignment the defendants had due notice.

To this complaint the defendants demur, upon the ground that it does not state facts sufficient to constitute a cause of action. The court below sustained the demurrer, and, plaintiffs having declined to amend, final judgment passed for the defendants. Being dissatisfied with this result, the plaintiffs have brought the case here.

In support of the demurrer, it is argued on the part of the defendants that an assignment of a part only of an entire demand is void *at law*, unless made with the consent or ratification of the debtor; that is to say, that no action *at law* can be maintained upon such an assignment, unless it was made with the express consent of the debtor, or was subsequently duly ratified by him; and that this is an action *at law*, and there is no allegation that the assignment was made with the knowledge and consent of the debtors, or that they subsequently ratified it.

Leaving out of view the practice which has been adopted in this state, and which has abolished in the matter of procedure and form all distinctions between law and equity, the position taken by the defend-

¹ 1 Story's Eq. Jur., § 630; Story on Partnership, § 235.

² Part of the opinion is omitted

³ Pratt, J., dissented; Selden, J., expressed no opinion; all the other judges concurred.

ants is, doubtless, impregnable. Indeed, the proposition is so well settled that it need only be stated. "At law, the debtor has a right to stand upon his contract," said Mr. Justice Story, in *Mandeville v. Welch*.¹ To allow the creditor to split an entire claim into any number of fragments he may choose, would subject the debtor to conditions to which he never assented, and involve him in embarrassments and responsibilities which he never contemplated. It has always been considered that a plaintiff having an entire demand, can not divide it into distinct parts and maintain separate actions upon each. If he undertakes such a course, a recovery in one action will bar the others.² If he can not do this himself, by parity of reason, he can not by an assignment enable others to do it, either in his name, as at common law, or, under the rule in this state, in their own.

This question, substantially, was before us in a recent case, involving the question whether part of an entire demand, so assigned, could be attached in the hands of the debtor, at the hands of a creditor of the assignee. We considered that it could not, for the reason that only the legal demands of the defendant in an attachment could be reached by garnishment; that is to say, only such demands as the defendant in the attachment could have recovered in an action at law, under the practice at common law, and that by the assignment in question the defendant in that case had acquired, if anything, only a lien in equity upon the fund, which the plaintiff undertook to reach by his attachment.³

The claim put forward by the plaintiffs, that the assent of the defendants to the assignment is alleged in the complaint, is without any substantial foundation. The allegation is, "of which said assignment the defendants have had due notice." This is not an allegation that the defendants knew of the assignment at the time it was made, and assented to it, or that they afterward did so. It is merely an allegation of the notice, which an assignee of such a demand as that declared on is required to give, in order to stop payment to his assignor, and thus secure to himself the subject of the assignment.

In view of what has been said, we must agree with counsel for defendants, that had the plaintiffs gone, under the English practice, into a court of law, upon the facts stated in the complaint, they could not have been allowed to recover. And if they could not have amended their complaint so as to show an express assent to the assignment by the defendants, they would have been finally told they were in the wrong forum. But under the system of practice which prevails in this state, such results do not follow. Legal and equitable relief are administered in the same forum, and according to the same general plan. A party can not be sent out of court, merely because his facts do not enti-

¹ 5 Wheaton, 277.

² *Smith v. Jones*, 15 John. 229; *Willard v. Sperry*, 16 Id. 121; *Marslou v. Pioche*, 8 Cal. 536; *Herriter v. Porter*, 23 Id. 385.

³ *Hassie v. G. I. W. U. Congregation*, 35 Cal. 378.

tle him to relief *at law*, or merely because he is not entitled to relief *in equity*, as the case may be. He can be sent out of court only when, upon his facts, he is entitled to *no relief*, either at law or in equity. If, then upon the *facts* stated in the complaint, the plaintiffs would have been entitled to relief in equity under the old system of practice, the ruling of the court below was erroneous.

Here, too, we agree with counsel for the defendants, that, under the English practice, a Court of Equity would not grant the plaintiffs relief, as the case now stands; not, however, upon the ground that the *facts* do not entitle him to it, but because *all of the parties* interested in the subject-matter are not before the court. There can be no question but that equity will sustain this assignment, and take an account of the indebtedness between Brooks & Co. and the defendants, and settle and ascertain the respective interests of Brooks & Co. and plaintiffs in the funds, and render judgment accordingly. This is not denied by counsel for the defendants. Indeed, that equity will do this, is quite as well settled as it is that law will not.¹ Had the plaintiffs made Brooks & Co. parties, and added a prayer for an account and apportionment of the debt due from the defendants, there could have been no question as to their right to relief. Under our system of practice, then, the real objection in this case is not a want of *facts*, but a want of *parties*. The defendants are entitled, if they so desire, to have all the parties having an interest in the subject-matter before the court, in order that its judgment shall be a final determination of the whole matter, and leave nothing to be done by piecemeal. But our system makes no distinction between law and equity cases, and if the defendants were unwilling that this case should proceed by piecemeal, or without the presence of Brooks & Co., they should have put their demurrer upon that ground. Having demurred only upon the ground that the facts are insufficient, their demurrer should have been overruled, for the statute expressly provides that if no objection be taken for the want of parties, the objection shall be deemed waived. The defendants were at liberty to waive the objection, if they saw proper to do so. This they did, by not taking the objection in the appointed mode.

In conclusion, it is proper to say that if, in the course of the subsequent proceedings in this case, the court should find it impossible to completely determine the controversy between these parties, without the presence of other parties, the court may order them to be brought in, notwithstanding the failure of the defendants to insist by demurrer upon their presence.² *Judgment reversed, and cause remanded.*

¹ Field v. Mayor of New York, 2 Seld. 179; Pope v. Huth, 14 Cal. 407; Pierce v. Robinson, 13 Id. 120.

² Practice Act, Sec. 17.

EMERY *v.* PEASE.

COURT OF APPEALS OF NEW YORK, SEPTEMBER, 1859.

[20 *N. Y.* 62.]

Appeal from the Supreme Court. The complaint set out an agreement between the plaintiff and the defendant, by which the former was acting as superintendent of a factory, and was to receive, in addition to a fixed salary, half the net profits of the business. It was provided that net profits were to be ascertained by deducting from the gross receipts various enumerated charges and expenses, and all losses in the business, including bad debts. The plaintiff was to keep the books, and at the end of each year an accurate account was to be taken of the stock and business of the factory, the net profits were to be ascertained, and the plaintiff's compensation was to be paid in cash or the defendant's notes at six months. The plaintiff averred that he served as superintendent one year, and that at the end thereof, with the knowledge and assent of the defendant, he made out an accurate account and inventory of the stock and business, and stated an account of the net profits of the business according to the stipulations of the agreement, and delivered the said statement in writing to the defendant on February 19, 1855, that he made no objection, and that he now (the complaint was verified March 30, 1855) has the same in his possession. Breach, that defendant refused to pay half the net profits stated in said account, which, after deducting a credit admitted by the complaint, amounted to \$6,544.62. Judgment is demanded for this sum with interest.

The answer averred that the entire balance claimed by the plaintiff consisted in uncollected demands for goods sold during the progress of the business upon terms of credit, which in most instances had not expired, and insisted that the defendant was not liable to pay any sum for net profits until the demands outstanding were collected, and the losses to happen from bad debts deducted therefrom.

On the trial at the Albany Circuit before Mr. Justice Gould, the defendant moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The judge granted the motion, holding that the plaintiff should have brought his action for an accounting. The plaintiff excepted and, the judgment against him having been affirmed at general term in the third district, appealed to this court.

William D. White, for appellant.

John H. Reynolds, for the respondent.

COMSTOCK, J.—Regarding the suit as an action at law according to the distinction between legal and equitable remedies which formerly

prevailed, we think the Supreme Court were right in holding that it could not be maintained upon the facts averred in the complaint. The pleader has set forth some matters of evidence having perhaps a slight tendency to prove that the account had been taken and the balance due to the plaintiff ascertained by the parties according to the principles of the agreement between them. But he seems carefully to have avoided the very conclusion of fact which alone would justify a suit for the recovery of an ascertained and admitted balance, to wit, that the parties had stated the account and that the statement thus made showed there was due to the plaintiff the sum which he claimed to recover. The averment that the plaintiff had made a statement and delivered it to the defendant who made no objections to it, does not necessarily establish the required conclusion even if it has a tendency in that direction; and consequently we cannot hold that the fact of an account stated between these parties has been pleaded in any manner or form. We are required, and we are always inclined, to give a liberal and benign construction to pleadings, under the present system; but if a party either ignorantly or willfully will omit the very fact on which his case depends, and will content himself with averring evidence inconclusive in its nature, he must take the consequences of his error if objection be made at the proper time.

But if an account of net profits has not been taken according to the rule furnished by the agreement, it seems to us, upon the fact stated, that the plaintiff is entitled to such an account and then to recover whatever sum, if anything, shall appear to be due to him. This is probably not the view in which the suit was brought, nor is it in accordance with the prayer of the complaint. But relief is to be given consistent with the facts stated, although it be not the relief specifically demanded,¹ and in determining whether an action will lie, the courts are to have no regard to the old distinction between legal and equitable remedies. Those distinctions are expressly abolished.² A suit does not, as formerly, fail because the plaintiff has made a mistake as to the form of the remedy. If the case which he states entitles him to any remedy, either legal or equitable, his complaint is not to be dismissed because he has prayed for a judgment to which he is not entitled. In this case the plaintiff was to be paid one-half of the net profits of a certain business, to be ascertained by an annual accounting in a particular manner. His averments are too feeble to show that any precise sum or any sum at all is due to him; but we think they do show that he is entitled to an accounting in order to ascertain whether anything and how much is due. That being ascertained by appropriate proceedings in the action, final judgment will be given accordingly.

The judgment must therefore be reversed, and a new trial ordered.

All the judges concurring,

Judgment reversed, and a new trial ordered.

¹ Code, § 275.

² Code, § 68.

THE NEW YORK ICE COMPANY *v.* THE NORTHWESTERN
INSURANCE COMPANY OF OSWEGO.

COURT OF APPEALS OF NEW YORK, JUNE, 1861.

[23 *N. Y.* 357.]

The action was brought on a policy of insurance against loss by fire. The complaint averred a claim on the policy for the loss, and it also averred facts from which it was claimed that an error had occurred in making out the policy. It demanded judgment for the amount of the loss, and, in case it should be necessary to the recovery that the policy be reformed and corrected, asked for a further judgment as might be necessary. The case was brought to trial, at special term, before Mr. Justice Ingraham without a jury, as an equity case. He was of opinion that the mistake, if any, was not in the written instrument, but a misunderstanding of the parties, by which there was a want of concurrence of minds upon the conditions of the contract; and this he held did not present a case for relief.

The plaintiffs then asked to have a further trial as to their right to recover upon the policy of insurance, as it actually stood without reformation. The judge held this inadmissible, on the ground that he had no authority to try the right of the plaintiff under the policy, without a jury, nor to send the case to a jury for a second trial. He conceded that had the right to equitable relief been established, it would have been his duty to proceed and do complete justice; but regarding the action as purely an equitable one, he held that a claim for mere legal relief could not be united. He therefore dismissed the complaint without prejudice to the right of the plaintiff to bring a new action upon the policy. The plaintiffs, having discovered that the time for bringing an action was limited by the terms of the policy and had expired, made an application at special term, and the judgment was so amended as to permit him to "serve a new complaint at law." On appeal, the order allowing this amendment was reversed, at general term in the first district, on the ground that the authority of the court to amend a judgment (without a hearing of the case) extended only to mistake or omission, and did not reach a case where the judgment was precisely what it was intended to be, and disposed of the whole case. The plaintiffs appealed to this court, and the defendant moved to dismiss the appeal.

William Curtis Noyes, for the motion.

Mr. Sherman, opposed.

COMSTOCK, CH. J.—[After stating the case.] I confess myself unable to see why the plaintiffs were not entitled to a reformation of the contract. The learned justice who tried the case, in the opinion given by him, after referring to the evidence, observes: "The only conclu-

sion I can adopt on this evidence is that there was a mutual mistake as to the description of the premises, arising from a misunderstanding of the parties in the original negotiation of the contract, and that the defendants' agent in making the policy made it as he intended it should be when he agreed to insure the property. The policy was made according to his description, entered by him in the books of the company," &c. Now if the misdescription of the subject of insurance was material, and was entered in the books of the company, and found its way into the policy in consequence of a mutual mistake or misunderstanding of the parties, it seems to me that a proper case was made out for a reformation of the contract.

In the next place, I am of opinion that it was erroneous to turn the plaintiff out of court on the mere ground that he had not entitled himself to the equitable relief demanded, if there was enough left of his case to entitle him to recover the sum in which he was insured. No suggestion was made that the complaint did not show a good cause of action for this money, even after striking out all the allegations and the prayer on the subject of equitable relief. But because it contained those allegations, and because these were tried without a jury and tried unsuccessfully, the court refused to entertain the case for the relief to which the plaintiff was in fact entitled, that is to say, for the recovery of the money without reforming the contract. This ruling proceeded wholly on the authority of the case of *Reubens v. Joel* in this court,¹ which it is intimated was a departure from previous cases also in this court. But this is a mistake. In that case a debtor had made, as it was alleged, a fraudulent assignment of his property; and a creditor, by simple contract, commenced a suit against the assignor and assignee praying a recovery of his debt, and for an injunction to restrain the alienation of the property assigned. The question in the case arose on demurrer, put in by the assignee, and the point determined in this court was, that such a creditor was not entitled in such a case to equitable relief by injunction. We all thought that the creditor had no standing in court, legal or equitable, as against the assignee, until after the judgment against his debtor, and whatever was said beyond this is to be taken as an individual opinion merely. The doctrine of the previous cases² favorable to uniting in the same action legal and equitable grounds of relief, was not intended to be disturbed, and a case in this court of a later date has reaffirmed that doctrine in the most explicit manner.³ In this case the point was very distinctly presented, and it was decided upon the fullest consideration. I think it proper to mention that the reason why I expressed no opinion in the case was, that I hesitated in regard to the power of the legislature under the constitution to abrogate all the distinctions between legal and equitable actions. That such was the expressed intention of the

¹ 13 N. Y., 488 (1856).

² *Crary v. Goodman* (1855), 12 N. Y., 266; *Marquat v. Marquat* (1855), 12 N. Y., 336.

³ *Phillips v. Gorham* (1858), 17 N. Y., 270.

legislature in the Code of Procedure, I never had any doubt. Both of these questions must now be considered at rest. . . .¹

But the enquiry remains whether the order of reversal, pronounced at the general term, can be reviewed in this court. We regret to find that there is no provision of law which authorizes such an appeal. The order appealed from does not, we think, "in effect determine the action and prevent a judgment from which an appeal might be taken."² On the contrary, it leaves in force a judgment in the action rendered upon the trial, from which an appeal might be taken, and, so far as we know, may still be taken. The case, therefore, does not seem to be embraced in any of the subdivisions of the 11th section of the Code, which is the only authority for appeals to this court. The appeal must therefore be dismissed, but without costs.³ *Appeal dismissed.*

LEONARD *v.* ROGAN.

SUPREME COURT OF WISCONSIN, JANUARY TERM, 1866.

[20 *Wis.* 540.]

The complaint in this case (which was against Sarah Rogan and her husband) stated that the said Sarah, in 1858, employed the plaintiff and his then partner, Williams, to bring an action to set aside a conveyance which she and her husband had made to the Milwaukee and Watertown Railroad Company, of certain real estate which Sarah Rogan owned as her separate estate; that the plaintiff and Williams, upon the credit of such separate estate, brought said action and prosecuted it to judgment in her favor; that their services were worth \$200; that Williams had assigned his interest in the sum due for said service, to the plaintiff; that Sarah Rogan still owned, as her separate property, certain real estate (particularly described); and that notwithstanding the benefit derived by her from said services, she had refused to pay therefor. Demand of judgment that the separate estate of Sarah Rogan be charged with the payment of the plaintiff's claim; that the court give such direction as it might deem just, as to the application of said separate estate to such payment; and for general relief. The answer of the defendant Sarah denied the material allegations of the complaint, and alleged that said action was brought at the instance of her husband, for his own benefit, and that he received the avails of the litigation.

¹ A part of the opinion, on another point, is omitted.

² Code, § 11, sub. 2.

³ Cf. *Rockwell v. Carpenter* (1881), 25 Hun, 529, 552; see also *Lattin v. McCarty* (1869), 41 N. Y., 111, 112; *Welles v. Yates* (1871), 44 N. Y., 525, 531; *Maher v. Hibernia Insurance Co.* (1876), 67 N. Y., 283, 292; *Nichols v. Drew* (1880), 19 Hun, 490, 493.

The court found that the plaintiff and Williams were employed to bring said action by the defendants Sarah and her husband jointly, and that the other facts were as stated in the complaint. The judgment was, that certain described real estate, which was the separate property of Sarah Rogan at the commencement of the action, or so much thereof as might be necessary, should be sold at public sale by a referee, with the usual directions that the plaintiff's claim be paid out of the proceeds, and that the purchaser be let into possession. Sarah Rogan appealed.

Enos & Hall, for the appellant.

J. A. Lovely, for respondent.

DIXON, C. J.—It was insisted in argument by the counsel for the appellant, Mrs. Rogan, that the proofs show that Williams & Leonard were employed by Mr. Rogan alone, or at least that it was a joint employment on the part of both Mr. and Mrs. Rogan. We have examined the evidence, and are satisfied of the correctness of the finding of the court below upon this point—that Williams & Leonard commenced the action at the request of Mrs. Rogan as well as that of her husband, and rendered their services as attorneys in the action upon the faith and credit of Mrs. Rogan's separate estate.

It was furthermore insisted by the same counsel, that if such was the contract, the action should have been against Mrs. Rogan at law, and not in equity, and that this suit must be dismissed. We agree with the counsel in the first part of this proposition. We think the contract is one which is obligatory upon Mrs. Rogan at law, within the doctrine of *Conway v. Smith*, 13 Wis., 125, and *Todd v. Lee*, 15 Wis., 365. It would seem to be not only more convenient but especially necessary to the proper use and enjoyment of her separate estate, that a married woman having such estate should have power to contract with an attorney for his services in order to reduce the same or any part of it to her possession, whenever it is wrongfully withheld by another. It would also seem to be one of the essential attributes of the unqualified dominion given by statute to a married woman over her separate estate, not only that she should be capable of entering into a contract of this nature with reference to such estate, but that such contract should be binding at law. We think that it is.

But upon the other branch of the proposition, we do not agree with the counsel. It by no means follows, because the plaintiff has demanded relief in equity when he should have asked a judgment at law for damages, that his action must be dismissed. Judgment at law and relief in equity are now granted by the same judicial tribunals. The old distinction between legal and equitable remedies is abolished, and the forms of pleadings in all civil actions in courts of record are now the same.¹ Except in cases where there is no answer, the plaintiff is entitled to any relief consistent with the case made by the complaint and

¹ R. S., ch. 125, sec. 1.

embraced within the issue, although it be not the relief specifically demanded.¹

If the plaintiff demands relief in equity, when, upon the facts stated, he is only entitled to a judgment at law, or *vice versa*, his action does not, as formerly, fail because of the mistake. He may still have judgment appropriate to the case made by the complaint. This is going, perhaps, somewhat further than this court has heretofore been required to go, but it is no doubt in strict accordance with the letter and spirit of the statutes referred to, and in harmony with the opinion of the highest court in the state of New York upon the same statutes, our legislature having borrowed the provisions from that state.²

LATTIN *v.* McCARTY.

COURT OF APPEALS OF NEW YORK, SEPTEMBER, 1869.

[41 N. Y. 107.]

Appeal by the plaintiff from the judgment of the General Term of the Supreme Court in the fifth district, affirming a judgment of the Special Term sustaining a demurrer to the complaint. The demurrer was at first stricken out as frivolous at Special Term in the seventh district; but on appeal to the General Term, this was reversed,³ and the demurrer was then argued at the Special Term in the fifth district, with the result already stated.

A deed of certain premises in the city of Auburn was executed by E. Corning to the defendant, Michael McCarty, at the request of Stanford, who had purchased the premises of McCarty, and for the sole purpose of completing his (Stanford's) chain of title. This deed was delivered to Stanford (and never to McCarty), with that intent, and by Stanford was deposited for record in the clerk's office. At this time Stanford had mortgaged to Fitch & Griswold, who had foreclosed and conveyed to Lattin, the plaintiff; and the latter had repaired the premises and put in a tenant. Hearing that there was a deed from Corning to him, recorded in the office, McCarty went to the tenant and bribed him to leave, took possession himself, and now holds adversely to plaintiff, claiming to own the premises by virtue of this deed. McCarty's former interest in the premises was under a *contract* from Corning to him; and in selling out to Stanford he had only assigned the contract, and Stanford, thinking McCarty had *deeded* to him, originated the mistake in getting and recording a deed from Corning to McCarty. These facts were set up in detail in the complaint.

¹ R. S., ch. 132, sec. 29; *Emery v. Pease*, 20 N. Y. 64.

² A part of the opinion, considering another question, is omitted.

³ 17 How. Pr., 140

The relief asked for by plaintiff is :

1st. Possession.

2nd. A conveyance of McCarty's apparent title, by quit claim or otherwise, &c., and that he be forever barred from setting up or asserting his pretended title.

McCarty's demurrer is on the ground :

1st. That the complaint does not set out facts sufficient to constitute a cause of action.

2d. That there is a defect of parties defendants.

3d. That several separate and distinct causes of action have been improperly united.

The case below is reported in 17 How. Pr., 240.¹

Samuel Hand and James R. Cox, for the appellant.²

John T. Pingree, for the respondent.

HUNT, CH. J.—The demurrer of the defendant, McCarty, was sustained, on the ground that inconsistent causes of action were included in the complaint. This decision was erroneous.

1. The complaint contains but a single cause of action, to wit: For relief against the deed under which McCarty fraudulently obtained possession. It is quite true that while the purpose of the complaint is single, it seeks to accomplish that result by several operations. It seeks to have the fraudulent deed set aside, and when that is done, it will follow that the plaintiff shall be awarded the possession of the property. The first is a means simply of obtaining the second. The one is the cause of action; the other is the fruit of the action. It is said that the two causes of action are: first, to vacate the fraudulent deed, and second, an action of ejectment to obtain the possession of the premises. Not so. The plaintiff has no legal title to the premises, and admits that he cannot sustain an action of ejectment, for that reason. His cause of action is simply to vacate the deed. If that is done, he insists, as a result, that the court will at once award him the possession of the property. It would be unreasonable, he argues, to compel him to resort to another action to obtain that to which he is clearly entitled, and which the court may award in the action before it. I think the reasoning is sound.

2. Assuming that the complaint does contain the two causes of action as insisted, the judgment was still erroneous. The argument principally relied upon to sustain the demurrer, is this, that the two causes of action are of different characters; one, an action of ejectment, being an action at law, the other an action to set aside a deed as fraudulent, and of an equitable nature; that the latter may be tried by the court, while in the former, the party is entitled to have his case passed upon by a jury. The codifiers labored assiduously to anticipate and to

¹ 8 Abb., 223.

² Appellant cited *Phillips v. Gorham*, 17 N. Y. 271; *N. H. R. R. v. Schuyler*, 17 N. Y., 592. *Dobson v. Pearce*, 12 N. Y., 165; *Crary v. Goodman*, 12 N. Y., 268; *Bidwell v. Astor Ins. Co.*, 16 N. Y. 267; *Laub v. Buckmiller*, 17 N. Y., 627; *Reuben v. Joel*, 3 Kern, 488.

overrule this objection. They recited in the preface to the Code, that "it is expedient that the present forms of actions and pleadings, in cases at common law, should be abolished; that the distinction between legal and equitable proceedings, should no longer continue; and that an uniform course of proceeding in all cases should be established." In section 69 (original section 62), it is further enacted that "the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this state, hereafter, but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action." And in section 167, it is provided, "that the plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both," under the conditions therein specified. In these provisions and in others, the distinction between legal and equitable causes of action, is recognized. There is no attempt to abolish this distinction, which would be quite unavailing. The attempt is to abolish the distinction between the forms of action and the modes of proceeding in the several cases. The difficulty under consideration has also been expressly overruled in this court, in the cases that I shall presently cite.

The case of *Phillips v. Gorham*, 17 N. Y., 270, is an authority in favor of the plaintiff. It was there held that in an action to recover specific real property, the plaintiff may attack a deed under which the defendant claims title, as well upon grounds cognizable at law, as upon those cognizable in a court of chancery, and that such proceedings can be had and heard in a single suit. This conclusion was reached after an able and learned opinion by Johnson, chief judge, in which both the provisions of the Constitution and the Code are fully considered.

In *Laub v. Buckmiller*, 17 N. Y., 626, Roosevelt, J., in delivering the opinion of the court, says: "I shall assume, as has been several times decided, that legal and equitable relief may be asked for in one action, and that the plaintiff claiming under a defective deed, and showing sufficient grounds for its reform, may have the same remedy as if he had brought two actions, one to reform the instrument, the other to enforce it as reformed."

Bidwell v. The Astor Mutual Ins. Co., 16 N. Y., 263, was an action to reform a policy of insurance, and to recover damages for the breach of the contract so reformed in the same action. On the proposition that an action should be brought to reform the policy, and that a separate action should be brought to recover the damages, the court says: "There was nothing in the objection that the court should have stopped with reforming the policy, and turned the plaintiff over to a new action to recover their damages. The rule of courts of equity was, when they

had acquired jurisdiction and had the whole merits before them, to proceed and do complete justice between the parties."¹ (Page 267.)

I can find no countenance for this demurrer in the allegation that the causes of action, assuming that there are two, are improperly united in the same complaint.² The rejoinder of several causes of action is expressly authorized, whether legal or equitable in their character, or both, where they both arise out of the same transaction, or transactions connected with the same subject of action.³ Such is the present case. The transaction is one out of which both causes of action arise. By the agreement between the plaintiff and McCarty, the former was entitled to the deed from Mr. Corning of the premises in question. By the error of the plaintiff and the fraud of McCarty the latter obtained the deed himself. The plaintiff now seeks to have the title transferred to himself through a correction of these wrongs. Both claims are harmonious and consistent with each other. They arise out of the same transaction, or certainly out of transactions connected with the same subject of action.

Judgment of the General and Special Term should be reversed.⁴

ll the judges concurring, judgment reversed.

WHITE v. LYONS.

SUPREME COURT OF CALIFORNIA, OCTOBER, 1871.

[42 Cal. 279.]

The complaint in this case, after setting forth facts entitling him to judgment at law against the defendant, prayed for an accounting that defendant might be adjudged to pay to plaintiff, in gold coin, what might appear on such accounting to be due, and for general relief. To this defendant demurred, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer being overruled and an answer put in, there was a trial before the court, and a judgment rendered on November 18th, 1868, in favor of plaintiff, for the sum of \$1613.70 with interest at the rate of ten per cent per annum on \$913.70 thereof from November 18th, 1863, and on \$700.00 thereof from July 1st, 1864—in all \$2376.00, in gold coin—the judgment to draw interest at seven per cent per annum. Findings were filed sustaining the judgment. The defendant moved for a new trial, which was denied, and he then took this appeal from the judgment.

¹ A part of the opinion, quoting from *New York Ice Co. v. Northwestern Ins. Co.* (1881), 23 N. Y., 357, 360, is omitted.

² Section 144.

³ Section 167.

⁴ Daniels J., also read an opinion for reversal.

Hall & Montgomery and *S. P. Seaniker*, for appellant.

J. H. Budd, for respondent.

By the Court, CROCKETT, J.—The demurrer to the complaint was properly overruled. Under the code there is but one form of action in this state, and if the complaint states facts which entitle the plaintiff to relief, either legal or equitable, it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action. If the facts stated are such as to address themselves to the equity side of the court, the appropriate relief will be granted by the court, sitting as a court of equity. On the other hand, if the facts alleged are purely cognizable in a court of law, the proper relief will be administered in that form of proceeding. But a complaint which states a sufficient cause of action, either at law or in equity, is not demurrable as not stating facts sufficient to constitute a cause of action. In this case the defendant does not question the sufficiency of the facts alleged to constitute a cause of action in a proceeding at law, but insists that this complaint is a bill in equity, and that a court of equity has no jurisdiction of the case. In that event, the court will treat it as an action at law, and administer the proper relief in that form of proceeding.¹

RICKETTS v. DORREL.

SUPREME COURT OF INDIANA, NOVEMBER TERM, 1876

[55 Ind. 470.]

From the Ohio Circuit Court.

H. W. Harrington, for appellant.

D. T. Downey and *A. C. Downey*, for appellee.

BIDDLE, J.—Replevin commenced before a justice of the peace. The cause of action is stated as follows:

"William Dorrel, being duly sworn, says that his personal property, consisting of seven hundred and thirty-eight rails of walnut and oak wood, of the value of fifteen dollars; and one hundred and sixty-four stakes of oak and walnut wood, of the value of five dollars, have been wrongfully taken and are unlawfully detained by James C. Ricketts; that said personal property has not been taken by virtue of any execution or other writ against him, and that he has sustained damages, by said wrongful taking and unlawful detention, in the sum of twenty-five dollars," etc.

Before the justice of the peace, the appellant moved the court to dismiss the action and quash the writ of replevin. His motion was overruled. Answer, general denial and two special paragraphs. During the trial before the justice, "it appeared to the court that the title to land was under dispute," and he thereupon certified the case to the Ohio circuit court. The parties in the circuit court appeared to the

¹ Only so much of the opinion is given as relates to the one point.

action, and the appellant, without taking any exception to the mode in which the case had been certified up, moved to dismiss the action. His motion was overruled, and exceptions reserved. Trial by jury, general verdict for appellee, and for five dollars damages, with answers to special interrogatories as follows:

"1. Is William Dorrel the owner and entitled to the possession of the rails and stakes described in the complaint?

"Answer. Yes."

"2. Was Dorrel the owner of the east half of the line fence between him and Ricketts, before the same was removed by Ricketts?

"Answer. Yes."

"3 Did the rails and the stakes in the complaint named, at the time when this suit was brought, and when seized by virtue of the writ of replevin herein, form a part of a partition fence, dividing the lands of Dorrel and Ricketts?

"Answer. Yes.

"4. At the time this suit was brought, and when they were seized by virtue of the writ of replevin herein, did they form a part of, and were they connected with, a standing fence?

"Answer. Yes."

The appellant moves "the court, upon his written motion, now filed, for a judgment on the special findings of the jury herein."

These proceedings were had at the January term of the court, 1875. At the March term of the court, 1875, the motion for judgment on the special findings was overruled, and exceptions reserved. No application or motion for a new trial, upon written causes filed, was made at the term the verdict was rendered. No question, therefore, which arises under a motion for a new trial, is presented in the record.¹

In support of the motion for a judgment on the special findings, it is insisted that they show the rails and stakes replevied to have been, at the time, erected into a fence, and remaining a part thereof; and that the fence, being a part of the realty, and owned by the parties as tenants in common, can not be replevied as personal goods.

The special findings in this case plainly show that the rails and stakes replevied, at the time the suit was commenced, and when they were taken by virtue of the writ, constituted a part of a standing fence, and were therefore, a part of the realty. We are of the opinion that they were not "personal goods" in the true meaning of the statute authorizing replevin,² and, therefore, not subject to be replevied, even admitting that they were wrongfully taken and wrongfully detained, and wrongfully put in the fence, by the appellant. If a person wrongfully took and detained shingles, and nailed them on his roof, or wrongfully took and detained brick, and laid them in a wall, it would

¹ *Krutz v. Craig*, 53 Ind. 561; *Griesel v. Schmal*, 55 Ind. 475; *Sherlock v. The First National Bank, etc.*, 53 Ind. 73; *Marshall v. Beeber*, 53 Ind. 83.

² 2 R. S. 1876, p. 623, see 71.

be a mischievous and unsafe rule to allow the owner to replevy them, even though his rights were greatly outraged. There are other remedies to redress a wrong of this kind; and in laying down the present rule as law, we deny the party no right, but simply refuse him a remedy by replevin. In the present case, if the appellee has suffered a wrong, we think he has mistaken his remedy to redress it.

The judgment is reversed, with costs. Cause remanded for further proceedings.

ON PETITION FOR A HEARING.

BIDDLE, J.—The earnestness of the petition for a rehearing in this case convinces us of the sincerity of the petitioner, but it seems to us that he has misconceived the scope of the opinion pronounced. He labors to convince us that when a tree is wrongfully converted into rails, they may be replevied; that when timber is wrongfully cut and converted into coal, the coal may be replevied; and he cites other similar cases. The opinion nowhere controverts these propositions. When an article is made personal property by being severed from the realty to which it first belonged, it may be replevied as long as its separate identity can be ascertained, whatever shape it may take; but when an article of personal property, though wrongfully taken, has become real estate by being attached to the realty, it can not be replevied, because it has lost its separate identity, and its character as personal property. To apply these principles to the present case:—If rails are wrongfully taken from a fence, they become personal property and may be replevied by the owner; but if rails are wrongfully taken and put into a fence, and thus made a part of the realty, they can not be replevied, because they have lost their separate identity, and can not be delivered without detaching them from the realty, of which they have become a part. And this is precisely the case we are considering. We have examined the authorities cited by the petitioner, and, as we read them, all the cases in replevin are against the petitioner. In *Davis v. Easley*, 13 Ill. 192, it is held, that a party may maintain replevin for boards made from trees wrongfully cut on his land; and also held that the owner of personal property, wrongfully taken, may replevy it so long as it can be identified, unless it is annexed to or made a part of some other thing which is the principal, as timber converted into a house, grain converted into malt, or coin converted into a cup.

The appellee labors hard, and cites many authorities, to show us that a wrong-doer can not obtain any title in the property he wrongfully takes, as against the owner—a proposition nowhere disputed; but it does not follow that the action of replevin will lie in all cases, merely because the owner has not lost the title to his property. Nor will our statute abolishing the distinction between the forms of actions aid the appellee. The legislature can not abolish the distinction between personal and real actions, nor between actions to enforce a specific performance of a contract or recover a specific article, and those which seek merely a

money judgment; nor between actions arising out of tort, and those founded upon contract; because the distinction exists in fact, and not in mere form. The distinction between the action of debt, covenant, assumpsit, trover, trespass, trespass on the case, and suits in equity to recover money directly, may be and is abolished by the code, because the remedy sought in all these cases is the same, namely a money judgment. The appellee, therefore, can not bring his action in replevin to recover his specific rails, and, failing in that, maintain his case to recover a money judgment for their value, merely because he has not lost his property in the rails. The law affords him ample remedy if he rightly chooses it; but it is no part of the duty of this court to instruct him as to what that remedy is. *The petition is overruled.*

McGONIGLE v. ATCHISON.

SUPREME COURT OF KANSAS, JULY TERM, 1885.

[33 Kan. 726.]

Error from Leavenworth District Court.

Action by Atchison against McGonigle, to recover \$2,000 damages for 200,000 bushels of sand alleged to have been taken from plaintiff's premises in Platte County, Missouri, by the defendant, brought to Leavenworth, Kansas, and converted to his own use. Trial at the December Term, 1883, and verdict for plaintiff for \$1. Defendant moved for a new trial, which motion the court overruled. Judgment upon the verdict for plaintiff. McGonigle brings the case to this court.

The opinion states the material facts.

Thomas P. Fenlon, for plaintiff in error.

J. H. Gillpatrick and *Lucien Baker*, for defendant in error.¹

VALENTINE, J.—This case has been brought to this court upon a "case-made," which is a model of brevity and clearness, and reflects great credit upon the able counsel who prepared it. The case has also been very ably presented to this court by counsel on both sides, and if we should err in its decision, it will not be their fault. The amount involved in this controversy seems to be small and trifling, but the principles involved are supposed to be of vital importance, and counsel for plaintiff in error, defendant below, says that the decision of the case involves the possible liability for not only many dollars, but many hundreds of thousands of dollars. We have therefore, given the case a very careful consideration.

The record of the case, as presented to this court, shows that on October 4, 1883, David Atchison filed his petition in the district court of Leavenworth county, in which petition he alleged, among other

¹ The arguments are omitted.

things, that he was then and had been for more than five years the legal and equitable owner of a certain piece of land, describing it, situated in Platte county, state of Missouri, and being on what is commonly known as "Leavenworth Island;" that the defendant, George McGonigle, did, on or about March 1, 1883, unlawfully and wrongfully enter upon said premises and dig sand thereon, and remove, take and carry away to the city of Leavenworth, and convert and appropriate the same to his own use, to wit, 200,000 bushels, of the value of one cent per bushel, to the damage of the plaintiff in the sum of \$2,000. and prayed judgment for the sum of \$2,000 and costs. To this petition the defendant answered, the answer being a general denial. Upon the issues as thus made, the cause came on for trial before the court and a jury; whereupon the defendant objected to the introduction of any testimony, upon the ground that the petition did not state facts sufficient to constitute a cause of action of which the district court had jurisdiction. This objection was overruled by the court, and the trial proceeded, and resulted in a verdict of \$1 for the plaintiff. The defendant moved for a new trial upon the ground of error of law occurring at the trial and duly excepted it, which motion was overruled, and the defendant excepted. Judgment was then rendered in favor of the plaintiff and against the defendant for \$1 and costs, to which judgment the defendant excepted, and now brings the case to this court for review.

Counsel for plaintiff in error, defendant below, states in his brief that the question involved in this case is as follows: "Is this a local or a transitory action? Is it trespass *quare clausum fregit*, or trespass *de bonis asportatis*?" We think the question may be more properly stated as follows: Do the facts of this case show a cause of action that is transitory, or one that is purely local? Or in other words, do the facts of this case show a cause of action in the nature of trespass *de bonis asportatis*, or trover, on the one side, or trespass *quare clausum fregit*, on the other side? If the facts show a cause of action in the nature of trespass *de bonis asportatis*, or trover, then the action is certainly transitory; but if they show only a cause of action in the nature of trespass *quare clausum fregit*, then the action is admittedly local. The distinction between transitory and local actions, both at common law and under the code, is generally and substantially as follows: If the cause of action is one that might have arisen anywhere, then it is transitory; but if it is one that could only have arisen in one place, then it is local. Hence actions for injuries to real estate are generally local, and can be brought only where the real estate is situated; while actions for injuries to persons or to personal property, or relating thereto, are generally transitory, and may be brought in any county where the wrongdoer may be found. These propositions we suppose are conceded. But the real contention between the parties to this action is, whether the real and substantial grievance set forth by the plaintiff as the foundation for his action is one which relates merely to real estate, or one which

may be considered as fairly relating to personal property. The petition states wrongs relating both to real estate and to personal property. It states that the defendant unlawfully and wrongfully entered upon the plaintiff's premises, in Missouri, and dug sand thereon. This of course was a wrong relating to real estate only; but the petition also states that after the sand was severed from the real estate, the defendant then removed the same to Leavenworth city, Kansas, and there converted and appropriated the same to his own use; and these last-mentioned wrongs certainly relate to personal property only; for as soon as the sand was severed from the real estate it became personal property.

This principle, of things becoming personal property when severed from the realty, is universally recognized by all courts and by all law-writers. Besides, the plaintiff in this case, after alleging the above-mentioned wrongs, then ask for damages only for the wrongful conversion of the sand, which was personal property, and does not ask for damages for injuries done to his real estate. He seems to waive all the wrongs and injuries done with reference to his real estate and to his possession thereof, provided the digging and the removal of the sand was any injury to either, and sues only for the *value* of the sand which was converted. We think it is true, as is claimed by the defendant, that the petition states facts sufficient to constitute a cause of action in the nature of trespass *quare clausum fregit*; but it also states facts sufficient to constitute a cause of action in the nature of trespass *de bonis asportatis*, and of trover; and we think the plaintiff may recover upon either of these latter causes of action, for they are unquestionably transitory; although it must be conceded that he can not recover upon the former cause of action, for it is admittedly local in its character, and because the plaintiff has brought his action in a jurisdiction foreign to the one where this local cause of action arose. But as the plaintiff asks no relief pertaining specially to the local cause of action, but only such as may be given upon the facts of the transitory cause of action, we think he may recover.

All the old forms of action are abolished in Kansas. We now have no action of trespass *quare clausum fregit*, nor of trespass *de bonis asportatis*, nor of trover; but only one form of action, called a civil action.¹ And under such form of action all civil actions must be prosecuted; and all that is necessary in order to state a good cause of action under this form is to state the facts of the case in ordinary and concise language, without repetition.² And when the plaintiff has stated the facts of his case, he will be entitled to recover thereon just what such facts will authorize.³ We now look to the substance of things, and not merely to forms and fictions. If the facts stated by the plaintiff would authorize a recovery under any of the old forms of action, he will still be entitled to recover, provided he proves the facts. If the facts stated

¹ Civil Code, § 10.

² Civil Code, § 87.

³ Fitzpatrick v. Gebhart, 7 Kas. 42, 43; Kunz v. Ward, 28 id., 132.

would authorize one or two or more kinds of relief, he may then elect as to which kind of relief he will obtain; and the prayer of his petition will generally indicate his election. And if one kind of relief is beyond the jurisdiction of the court, and the other within such jurisdiction, the plaintiff may elect to receive that kind of relief which is within the jurisdiction of the court. We think the plaintiff may maintain his present action as an action in the nature of trespass *de bonis asportatis*, or trover. When the sand was severed from the real estate it became personal property, but the title to the same was not changed or transferred. It still remained in the plaintiff. He still owned the sand, and had the right to follow it and reclaim it, into whatever jurisdiction it might be taken. He could recover it in an action of replevin,¹ or he could maintain an action in the nature of trespass *de bonis asportatis*, for damages for its unlawful removal,² or he could maintain an action in the nature of trover, for damages for its conversion, if it were in fact converted,³ or he could maintain an action in the nature of assumpsit, for damages for money had and received, if the trespasser sold the property and received money therefor.⁴

In all cases of wrong, the tort or a portion thereof may be waived by the party injured, and he may recover on the remaining portion of the tort or on an implied contract, provided the remaining facts will authorize such a recovery. Mr. Waterman, in his work on Trespass, uses the following language:

"Section 1102. Although as standing trees are part of the inheritance, and the severing them from it is deemed an injury to the freehold, for which trespass *quare clausum fregit* is the appropriate remedy, yet the party may waive that ground of recovery, and claim the value of the timber only thus severed and carried away. In the one case, the entering and breaking of the close is the gist of the action; in the other, the taking and carrying away of the property. In the latter case, the action is transitory, and not local."⁵

The plaintiff in error, defendant below, has cited a large number of authorities, but under our code of practice and procedure they hardly apply to the facts of this case. Those nearest applicable are the following: *Am. Un. Tel. Co. v. Middleton*, 80 N. Y. 408; *Frost v. Duncan*, 19 Barb. 560; *Howe v. Willson*, 1 Denio, 181; *Sturgis v. Warren*, 11 Vt. 433; *Baker v. Howell*, 6 Serg. & R. 476; *Powell v. Smith*, 2 Watts, 126; *Uttendorffer v. Saegers*, 50 Cal. 496.

The case of *The Telegraph Company v. Middleton*, *supra*, was where

¹ *Richardson v. York*, 14 Me. 216; *Harlan v. Harlan*, 15 Pa. St. 507; *Halleck v. Mixer*, 16 Cal. 574.

² *Wadleigh v. Janvrin*, 41 N. H. 503, 520; *Bulkley v. Dolbeare*, 7 Conn. 232.

³ *Tyson v. McGuineas*, 25 Wis. 656; *Whidden v. Seelye*, 40 Me. 247, 255, 256; *Riley v. Boston W. P. Co.*, 65 Mass. 11; *Nelson v. Burt*, 15 Mass. 204; *Forsyth v. Wells*, 41 Pa. St. 291; *Wright v. Guier*, 9 Watts, 172; *Mooers v. Wait*, 3 Wend., 104.

⁴ *Powell v. Rees*, 7 Ad. & E. 426; *Whidden v. Seelye*, 40 Me. 255; *Halleck v. Mixer*, 16 Cal. 574. See also in this connection the case of *Fanson v. Linsley*, 20 Kas. 235.

⁵ See also *Nelson v. Burt*, 15 Mass. 204; *Halleck v. Mixer*, 16 Cal. 574.

the defendant committed a trespass by cutting down telegraph poles in a highway, and throwing them in the ditches and on the fences on the sides of the highway, and leaving them there. There was no asportation from the premises, no conversion, and no intended asportation or conversion; and the court held that the action was therefore trespass *quare clausum fregit*, and not trover, and that the action was therefore local in its character and not transitory. The case of *Frost v. Duncan*, *supra*, was not decided by a court of last resort; and the main question decided was that two causes of action were improperly joined in one count. Besides, in that case the defendants were in the actual possession of the land, claiming the same as their own under a deed. The next four cases were not decided under any reformed code of procedure, and we do not think that the seventh and last case cited conflicts with the views that we have expressed. The fact that the question of title to real estate was incidentally raised in that case makes no difference. See the cases heretofore cited, and especially *Harlan v. Harlan*, 15 Pa. St. 507; *Halleck v. Mixer*, 16 Cal. 574. The plaintiff was in possession, claiming to own the property, while the defendant was a mere wrongdoer, with no claim of interest in the land.

We have so far considered this case as though it made no difference whether the sand was severed from the real estate and carried away by one act only, or by two or more; nor do we think that it can make any difference. Under any circumstances, the sand remains the property of the owner of the land until he chooses to abandon the same. We suppose that if the sand were severed from the real estate by one act, and then carried away by another, this proposition would not be questioned, and probably it will not be questioned even if the sand was severed and carried away by a single act; and if the sand remains the property of the owner of the real estate, as we think it does, there can be no good reason why he should not be entitled to all the remedies for its recovery, or for loss or damages for its injury, or detention or conversion, which he might have with respect to any other personal property.

The judgment of the court below will be affirmed.

All the Justices concurring.

HARRIS v. TOWNSEND.

SUPREME COURT OF ARKANSAS, NOVEMBER TERM, 1889.

[52 Ark. 411.]

The complaint in this action alleges that about the 6th day of March, 1887, the plaintiff, Townsend, and the defendant, Harris, entered into a partnership for the purpose of editing and publishing the "Arkadelphia News," a weekly newspaper—Harris being publisher and Town-

send editor ; that about the 20th day of July, 1887, that being the day of publication,

"the defendant having possession of the only key to the office of publication, wickedly, maliciously, and with the intent to stop the publication of said paper without consulting plaintiff, and against his will, locked the door of said printing office, carried therefrom the joint lever of the press, without which it could not be run, and also took the half-printed paper for that week, and secreted them so that plaintiff was unable to get possession of the same, or to have them in the office until the order of the Chancery Court commanded him to replace them ; that by reason of said unbusinesslike conduct, the newspaper was suspended for about two months, and many of its subscribers and advertising patrons were driven away, to the great damage of the plaintiff, in the sum of \$200."

The defendant's answer contains : *First*—The plea of *res adjudicata*. *Second*—A denial of the damage alleged, and an allegation that the property was taken by defendant, in order to prevent the continuance of the partnership against his will.

The plea of *res adjudicata* was heard by the court sitting as a jury, and its findings of law and fact are as follows : "That, previous to July 20, 1887, the plaintiff and defendant were engaged as partners in running a newspaper in Arkadelphia, called the Arkadelphia News ; that on the 25th day of July, 1887, plaintiff herein brought a chancery suit on the equity side of this court, numbered 859 ; that defendant herein was defendant in that suit ; that plaintiff's complaint asked for a permanent injunction, restraining the defendant from unlawfully interfering with the partnership property, alleging certain reckless and unbusinesslike conduct upon defendant's part ; that on the first of August, 1887, this defendant in that suit filed an answer and cross-complaint, asking that said partnership be dissolved, and for a settlement of the same. On August 6th, 1887, plaintiff in that suit filed his answer to the cross-complaint of this defendant, and in that answer one of the paragraphs set up a counter-claim for damages sustained by plaintiff herein, alleging the same cause of action set up in the complaint herein, and claiming the same amount of damages asked in the complaint by the plaintiff ; that no objection appears to have been raised on the part of defendant to the counter-claim, and that it nowhere appears from the record in that cause that the said counter-claim was ever withdrawn by plaintiff ; that defendant did not demur to said counter-claim, nor move to transfer it to the common law docket ; that plaintiff did not ask said court to order the issue on this counter-claim to be tried by the jury ; that the court, on the — day of December, 1887, made a final decree in said cause, settling all the matters put in issue in said cause. The court finds that the acts complained of in the complaint herein were committed by one partner to the partnership property while the partnership existed. The court finds as a matter of law that a court of equity had no jurisdiction, in suits by one partner to obtain damages for the tortious acts of another partner to the partnership property while the

partnership lasted, to award damages, and that the answer to the cross-complaint in the chancery suit herein, raised no issue triable in a court of equity, even though defendant did not object to the trial of that issue in that case; that a court of equity can not award damages for a tort by a partner to partnership property. The court therefore finds as a matter of law, that the decree of the Clark Chancery Court, in the case of *Townsend v. Harris*, No. 859, on chancery court, rendered on the — day of December, 1887, does not bar this suit between the same parties, and consequently the cause of action set forth in plaintiff's complaint herein is not *res adjudicata*." Thereupon the case was tried upon the complaint and the second paragraph of the answer before a jury, and a verdict was rendered for plaintiff in the sum of \$25. The defendant appealed.

Crawford & Crawford, for appellant.

Murry & Kinsworthy, for appellee.

PER CURIAM.—The authorities cited by the appellee are to the effect that an action by a partner against his co-partner for injury done to the partnership property is cognizable in a court of law. None goes to the extent of holding that the matter is not cognizable in a court of equity, in an action of account for final settlement.

But even if the issue were not properly cognizable in equity, can it be held that the judgment is void? Under the code a plaintiff is only required to make a plain statement of his case in his complaint. If the case stated would formerly have been an action at law, either party is entitled to a trial by jury after the manner of the common law; but if the cause as stated would have been distinctly equitable under the old system, then it is triable according to the former chancery method. That is the substantial difference between law and equity under the new procedure. It does not recognize one judge as presiding over separate tribunals, the clash of whose jurisdictions confounds the practitioner and ruins the suitor. One court, endowed with the powers to try all causes, administers the whole law. For its convenience separate dockets are kept for the two classes of cases. If no objection is made to the form of trial—that is, whether it shall be according to the common law or chancery practice—it is adjudged not to be error to try a common law case according to equity practice, or an equitable case according to the practice of the common law.¹ It follows that if objection is made, and the court applies the wrong form of trial to the case in hand, it commits only an error in the exercise of rightful jurisdiction, because the power to determine the cause and the method by which it shall be tried, is devolved upon it. An erroneous judgment pronounced in such a case is not a nullity.

On the finding of the court, its judgment should have been for the appellant upon his plea of *res adjudicata*, and such judgment will be rendered here.

¹ *Organ v. Railway*, 51 Ark. 235.

GUNSAULLUS, ADM'R. *v.* PETTIT, ADM'R.

SUPREME COURT OF OHIO, MAY 22, 1888.

[46 O. S. 27.]

Error to the Circuit Court of Huron County.

F. D. Gunsaulus and *G. T. Stewart*, for plaintiff in error.*T. H. Wiggins*, for defendant in error.

MINSHALL, J.—The suit below was brought by the administrator of a deceased wife against the administrator of her deceased husband, and sought to charge his estate with a claim for money had and received by him in trust for her. They intermarried in 1836, she being at the time the widow of Merritt Pettit deceased, in whose lands she had a dower estate. It is claimed that her last husband, the decedent of the plaintiff in error, received the rent arising from the dower estate of his wife in the lands of her former husband, amounting to \$2,950, and, also, the money paid by a railway company for the right of way through her dower estate, and that in 1868 he received her share in the estate of her father, amounting to \$650.59; that all these sums were received by the husband in the right of the wife, without intention to make the same his own; that he so held the money in trust for her, and had promised to invest it for her use, but died before doing so. All the material facts were controverted by the answer. The case was tried to the court, a jury being waived; the court found for the defendant and dismissed the petition. Thereupon the plaintiff below appealed to the district court, and, the cause having been transferred to the circuit court, a motion was made therein to dismiss the appeal on the ground that neither party was entitled to a jury on the issues of fact joined between them. The motion was overruled, and, a trial being had, the circuit court rendered a judgment in favor of the appellant. In refusing to dismiss the appeal we think the court erred.

The constitutional limitation as to trial by jury is on the power to abridge, and not on the power to extend, the right of trial by that method. The right may be extended, but not abridged. So that the question is not merely, whether at common law, either party had, upon the issues joined, a right to trial by jury, but whether under the provisions of our code of civil procedure such right is awarded him. The code provides¹ that issues of fact arising in actions for the recovery of money only shall be tried by a jury, unless waived by the parties; and such actions are not appealable.² Hence the right of a party to trial by jury, in a given case, does not depend upon the character of the principles upon which he may base his right to relief, but upon the nature and character of the relief sought. If the relief sought is a money

¹ § 5130 R. S.² § 5226 R. S.

judgment only, and all that is required to afford him a remedy, it is immaterial whether his right of action is based upon what were formerly regarded as equitable or upon what were regarded as legal principles. In either case the remedy must be sought in the civil action of the code; and in it trial by jury is given upon all issues of facts where the relief sought is a money judgment only.¹

The claim of the plaintiff below, when reduced to its substance, is, that the husband of his intestate received moneys belonging to her, that he promised to hold and invest for her use. For not doing so, he asks to recover a judgment for money against the administrator of the husband for the amount so received; and such judgment and none other was rendered by the circuit court. The fact that the court ordered that it should be a lien upon all the lands of which the husband died seized, added nothing to the relief granted; for such would have been its effect had no such order been made, had the court had jurisdiction to hear and determine the case on appeal.

The fact that prior to the code the only remedy would have been a suit in equity, does not affect the right of either party to demand a jury trial upon the issues of fact joined in the action. Hence the case of *Huber v. Huber's Adm'r*, 10 Ohio, 371, has no application to the question presented here. The case then was not appealable, and the circuit court erred in not sustaining the motion to dismiss the same.²

Judgment reversed and appeal dismissed.

¹ Citing *Alsodorf v. Reed*, 45 O. S. 653.

² See also *Koelsch v. Mixer* (1891), 5 Ohio C. C. 404; and compare *McCrory v. Parks* (1868), 18 O. S. 1; *Black v. Boyd* (1893), 50 O. S. 46: "The equity jurisdiction of a court of common pleas, in matters of mutual and complicated accounts, is not abrogated by section 5130, Revised Statutes, which provides that either party may demand a jury trial of 'issues of fact arising in actions for the recovery of money only.' An action is not one for the recovery of money only, within the purview of the statute, where, to administer full and complete relief therein, it is necessary to invoke the equity powers of the court to adjust the accounts between the parties, and in such case either party may, by virtue of section 5226, of the Revised Statutes, appeal to the circuit court from the judgment of the court of common pleas."

KIRKWOOD v. FIRST NATIONAL BANK OF HASTINGS.

SUPREME COURT OF NEBRASKA, JANUARY TERM, 1894.

[40 Neb. 484.]

Error from the District Court of Adams County
L. W. Billingsley and R. J. Greene, for plaintiff in error.
Tibbels, Morey & Lewis, contra.¹

IRVINE, C.—The plaintiff in error was the plaintiff in the district court. In her petition she avers that on December 4, 1890, she deposited with the defendant bank \$3,000, for which the defendant issued to her a certificate of deposit; that on or about June 6, 1891, she lost the certificate and at once gave notice of loss to the defendant; that she had not at the time of the loss or at any other time indorsed the certificate or in any way negotiated or hypothecated the same. The prayer was for a judgment for the amount of the certificate with interest.

The defendant, by its answer, admits the deposit and the issuance of a certificate in words and figures as follows:

"FIRST NATIONAL BANK,

"HASTINGS, Nebraska, Dec. 4, 1890. 28906.

"This certifies that Miss Rose Kirkwood has deposited in this bank three thousand dollars (\$3,000), payable to order of self, in current funds, on return of this certificate properly indorsed. This deposit not subject to check. With interest at six per cent if left six months; no interest after six months.

"Certificate of deposit."

C. B. HUTTON, for Cashier."

The defendant further alleged that when the plaintiff demanded payment she failed to produce the certificate, claiming that she had lost it; that the defendant was at all times ready and willing to pay the certificate upon its production, or, if lost, to pay it upon the execution and delivery of a sufficient indemnifying bond. The defendant then denied each and every allegation in the petition not specifically admitted or modified, and prayed that the plaintiff be ordered to execute and deliver an indemnity bond to secure it against any loss by reason of said certificate.

There was a trial upon these pleadings, a jury being expressly waived, and the following finding and judgment were entered:

"This cause comes finally on to be heard upon the petition of the plaintiff, the answer of the defendant, and the evidence, and the same is submitted to the court; upon consideration, the court finds that there is due to the plaintiff from the defendant upon the cause of action set out in her said petition the sum of \$3,090.

"It is therefore considered and adjudged by the court, that the plaintiff have and recover of and from the said defendant the said sum of \$3,090, and that each party to this action pay half of the costs herein.

¹ The arguments are omitted.

"It is also considered and ordered by the court that the defendant pay the said sum of \$3,090 to the clerk of this court, to be paid over to said plaintiff upon the filing by plaintiff, with the clerk of this court, of a good and sufficient bond of indemnity with approved sureties, to be approved by said clerk, indemnifying the said defendant against any and all liability which may hereafter arise and might subject the said defendant to the payment of the said certificate of deposit, as set out in said petition, and heretofore lost by said plaintiff."

The plaintiff brings the cause here, assigning several errors, all, however, going to the authority of the court to make an order requiring a bond of indemnity. There is no bill of exceptions and the case can be reviewed only upon the petition, answer, and judgment.

There is a great deal of argument in the briefs to the effect that the action was begun as one at law; that an action at law can only be maintained upon a lost instrument when it is non-negotiable, or, if negotiable, when lost after maturity or unindorsed, and that in any event in an action at law no indemnity can be required. These distinctions have been recognized in England and generally in those of the United States where the courts of law and equity are distinct. But counsel lose sight of the fact that our district courts are courts of general law and equity jurisdiction; that the code abolishes formal distinctions between law and equity, and that where a cause of action, either at law or in equity, is stated in a petition the district court may administer relief according to the nature of the case, without regard to forms of action. Had the old practice prevailed, upon the tender of proper issue, if the court had found that indemnity was proper, the plaintiff could have obtained no relief if she began at law. Had she begun in equity, she would have obtained the appropriate relief according to the pleadings and the proof. Under our practice, she alleging a state of facts entitling her to relief at law and the defendant by answer setting up facts entitling it to equitable relief, the question is not one of jurisdiction but of proof, and the court had jurisdiction to enter either an absolute judgment or one conditioned upon the execution of an indemnity and according as the proof might justify. . . .¹

There is no finding sufficient to sustain that portion of the judgment requiring indemnity. That portion of the judgment is reversed, and the cause remanded for a new trial upon the issues relating to the defendant's claim for indemnity.

Judgment accordingly.

¹ Part of the opinion, dealing with other topics than the question of pleading, is omitted.

RAYMOND *v.* RAILWAY COMPANY.

SUPREME COURT OF OHIO, DECEMBER 14, 1897.

[57 O. S. 271.]

The plaintiff's action was commenced in the court of common pleas, April 22, 1892, by the filing of a petition alleging in substance, that the plaintiff was, and has been for more than twenty-one years, the owner of, and in undisputed possession of certain lots in the city of Toledo; that the defendant company, and the other defendants, its officers, with full knowledge of plaintiff's ownership and possession, had entered upon said land and placed stakes, etc., thereon, and were proposing to forcibly and unlawfully enter upon and take possession of the lands under some pretended claim of title, which, if pursued, would cast a cloud upon the title of plaintiff, and do him irreparable injury. An injunction was asked restraining the defendants from entering upon the lands, and that, if there be any dispute as to the true boundary line, that the same may be determined by direction of the court, and that plaintiff have all proper relief.

An injunction was allowed on this petition. Two amendments followed, more particularly defining the boundaries. May 25, 1894, an answer was filed taking issue as to the ownership of the land and as to possession, and setting up new matter by way of defence. A reply followed denying the averments of new matter. November 3, 1894, a supplemental petition was filed, making Samuel R. Galloway, receiver, a party, and on the same date an amendment to the reply, further replying to the answer, was filed.

At the May term, 1895, leave was granted plaintiff on his application, to file an amended and supplemental petition, and to make R. B. F. Pierce, receiver, a party, and on June 3, 1895, a pleading entitled "amended and supplemental petition" was filed, a synopsis of which is given in the opinion. October 10, following, was filed the answer of the company to the amended and supplemental petition filed June 3, 1895, in which it alleged in substance: 1. That it was an Ohio corporation owning a line of railway from Toledo to East St. Louis, Illinois; that it was the owner of certain yards and tracks in Toledo; that said Pierce was the duly appointed, qualified, and acting receiver, under appointment from the Circuit Court of the United States; that as such he was in possession and control of and operating said railroad; that at and about the time of the commencement of the action and subsequent thereto, the defendant company was in possession of the land claimed by plaintiff, and had theretofore constructed a fence thereon; that since the twenty-third day of January, 1895, said Pierce, receiver, had been, and still was, in the possession of said land; and the defendant denied each and every other allegation in the amended and supple-

mental petition contained. 2. Adverse possession for twenty-one years. 3. That the company and its grantors, being in possession, had made valuable improvements thereon for railroad purposes with full knowledge and consent of the owner, who made no protest or objection, which conduct was acted upon by the company, and it would be greatly injured by allowing plaintiff now to establish any right or title to, or interest in said land. 4. Statute of limitation of twenty-one years. And asked to be hence dismissed with its costs.

A reply to this answer was filed on the day of trial.

At the October term, the plaintiff, having been granted leave to file instant his reply to this answer, and the reply (as above stated) having been filed, the cause thereupon came on to be heard and was submitted upon the pleadings and the evidence. And the court, being fully advised in the premises, and having heard the arguments of counsel, found for the defendants. It then ordered, adjudged, and decreed, that the petition and the amended and supplemental petitions of plaintiff be dismissed, and that defendants go hence without a day, and recover costs. Thereupon notice of appeal was given, amount of bond fixed, and bond duly given.

In the circuit court defendants interposed a motion to dismiss the appeal on the ground that the cause is not appealable. The circuit court sustained the motion, and dismissed the cause and the appeal. Reversal of this order of dismissal is now asked.

Hurd, Brumback & Thatcher and *Erwin P. Raymond*, for plaintiff in error.

Brown & Geddes and *Clarence Brown*, for defendants in error.¹

SPEAR, J.—The question whether the cause was or was not appealable, depends upon whether the case in the court of common pleas was one in which a jury trial could of right be demanded. This depends upon the character of the case which was actually tried. It is conceded that upon the original pleadings, and the issues made as they stood prior to the filing of the amended and supplemental petition, June 3, 1895, the cause was one in equity, and triable to the court alone. It is contended by plaintiff in error, that the nature of the action was not changed at any stage of the controversy, but remained an action to establish a boundary line; to prevent multiplicity of suits; to prevent irreparable damage about to be done by an insolvent defendant to property of plaintiff against his protest; and to quiet title and remove a cloud from title, and so was a case in equity to the end; that this is abundantly shown by the pleadings, taken together, and the judgment rendered and was so understood by all the parties and by the trial court, and that this is made clearly apparent by the reply filed October 16, 1895, and the action of the court at the trial. Section 79, Revised Statutes, is cited as authorizing a proceeding to quiet title as here prayed. And it is true that the last reply avers, that "the main ques-

¹ The arguments are omitted.

tion at issue between plaintiff and defendant, is the boundary line of what is known as the bed of the Miami and Erie canal, so called; " also, that since the commencement of the action, the company has been from time to time encroaching on the lots of plaintiff, to his great and irreparable injury, and that the action among other things, is to prevent vexatious and repeated litigation. And the reply does pray—

" in addition to his prayer in the amended and supplemental petition, that the court will establish and fix the boundary line of the said Miami and Erie canal bed, and decree that the premises in question belong to this plaintiff."

It is true, also, that the cause was tried to the court without formal waiver of a jury, and that the court, in its journal entry, does adjudge and decree that the petition, as well as the amended and supplemental petition of the plaintiff, be dismissed, all which gives color to the claimed understanding. But the ultimate question is not, what was the understanding of counsel, or even of the trial court, as to the character of the issue joined, nor yet the form of the judgment rendered, but what, in law, was the nature of the action, and what the character of the issues, as shown by the pleadings which control the case. And this leads to an inquiry respecting the effect upon the case made in the original pleadings by the filing of the amended and supplemental petition of June 3, 1895, and as to the case presented by that pleading.

That a plaintiff may substitute an amended petition in the place of the original, and change the form of action from an equitable action to a legal action, where the general identity of the transaction is maintained and the claim not substantially changed, admits of no question; nor is there doubt that if such change is made, the court, in determining the issues to be tried, will look wholly to the amended pleadings, disregarding the original, and the cause will thereafter be treated as a suit at law solely, and will proceed to trial and judgment as though it had been commenced as a legal action.

The effect of the pleading filed June 3, 1895, upon the issues theretofore raised in the case, would not be conclusively determined by its title of "amended and supplemental petition," nor by the expression "for amended and supplemental petition herein," to be found in the first line, although such title and such statement should not be overlooked in ascertaining its effect, but if the new pleading appears to have been filed not by way of addition merely, to the original petition, and if it appears also to contain a full statement of the plaintiff's case, being on its face a statement of an entire cause of action, and in substance a substitute for the original, the filing of it by the plaintiff will be regarded as implying an abandonment by him of the case made in the original petition and any additions thereto, and as selecting this as the pleading on which he founds his suit, and the only petition which the court is to consider in determining the issue to be tried. Such, we

think, is the scope of this pleading, as must be apparent to any legal mind on an inspection of it.

What, then, is the character of the case which this pleading makes?

It starts with the introductory phrase "for amended and supplemental petition herein," then follows a description of the defendant company, and an averment that it is the owner of a line of railway from Toledo to St. Louis, and now is, and for a long time heretofore has been, the owner of certain yards and tracks operated by it in connection with its said line of railway in Toledo, and that one Pierce is receiver, now in possession operating the road. It then avers that plaintiff claims an estate in, and is the owner in fee simple of, four lots on the Port Lawrence division of Toledo, as laid out and platted, and in size as shown by the Gower & Walker maps of Toledo; that for a long time the defendant company, its predecessors and grantors, acquiesced in his ownership and possession "until up to about the time of the commencement of this action," at which time the defendant company, well knowing of the rights and ownership of plaintiff unlawfully and forcibly entered upon the lots, against the protest of plaintiff, and took possession of, and fenced in a large portion thereof, and laid its railroad tracks thereon, without making any compensation to plaintiff, to wit: a strip fifteen to thirty-five feet in width, next adjoining the property of the company, being formerly the canal bed of the Miami and Erie canal, and the company and the receiver continue to hold possession, interfering with plaintiff's rights and casting a cloud upon his title, to his great and irreparable damage. Then follows an averment that defendant's only title is by virtue of a claimed purchase of the canal bed, which is only eighty-eight and one-half feet wide, although the defendant, at the commencement of the action claimed, and now claims, a greater width, and under said claim has forcibly entered upon and taken said portion of plaintiff's lots without compensation, and that the defendant's claim is adverse to plaintiff's rights. The prayer is that the defendants show their interest in the property; that it may be adjudged null and void; that judgment for the possession of said property may be awarded to the plaintiff, and defendant enjoined from interfering therewith until compensation has been made, and for other proper relief.

It must be manifest that the reference to the Gower & Walker map, and the statement of the company's knowledge of and acquiescence in plaintiff's ownership and possession, and of its title, and the width of the old canal bed, are but statements of evidence, and can not aid the petition, and that the averment as to the possession of the company casting a cloud upon the plaintiff's title to his irreparable damage, and that its claim is adverse to plaintiff's rights, are simply legal conclusions. It is to be noted, also, as a significant fact, that while there is abundant claim of ownership in plaintiff, there is not a clear allegation of possession in him anywhere in the pleading. The allegation that

defendant acquiesced in the ownership and possession of plaintiff "until up to about the time of the commencement of the action, at which time the railroad company entered upon and took possession of, and fenced in a large portion thereof, and laid its tracks thereon," if intended as a claim of possession in plaintiff at the time, is at best a dubious and equivocal averment, for the term "until up to about" would naturally imply a time preceding the date given. And it would seem that the draftsman could hardly have intended to aver possession in plaintiff at the commencement of the action, especially when it is remembered that a preliminary injunction was allowed at the filing of the first petition, and that there is no claim in this petition that the company acquired possession, or enlarged its possession, in violation of the court's order. It follows, we think, conclusively, that at the commencement of the action, the company was in possession of the strip in controversy, and that the primary object sought, as shown by this petition, was to procure the judgment of a court ousting it from that possession. This construction is aided by the fact that the receiver is, by supplementary pleading, made a party. No allegation, save as to possession, is made against him, nor was he for any other matter than possession, a necessary party, having acquired whatever right he had during the pendency of the action.

Thus we have a case of a plaintiff out of possession making claim and title to possession of land, and praying a court to adjudge his title good and award him possession; in other words, praying to recover the land. All other relief sought is ancillary to this; it is relief which, if a proper case is made by the evidence, may follow, but can not precede, judgment of possession. That is, the case made in the pleading is for possession of land, and then equitable relief to prevent the company interfering with that possession until compensation shall be made. The real and primary question was one of title. That settled in favor of the plaintiff, all other claims would follow and be determined as matters of relief in aid of the recovery, while, if settled against the plaintiff, his whole contention would fail. It seems to us that it would be an unnecessary waste of space to stop to demonstrate that this action, as made by the amended and supplemental petition, is, as matter of primary relief, neither a bill for an injunction to restrain a continuing trespass, nor a bill to establish a boundary line between adjoining proprietors, nor an action to prevent a multiplicity of suits. Nor could it be maintained as an action to quiet title under section 5779, Revised Statutes. That section authorizes the bringing of an action "by a person out of possession, having or claiming to have, an estate or interest in remainder or reversion in real property, against any person who claims to have an estate or interest therein, adverse to him, for the purpose of determining the interests of the parties therein." The plaintiff does not claim to have an interest in remainder or reversion; he claims to have title to the entire estate, present as well as prospective.

Nor can it be reasonably claimed that the plaintiff's case is changed, or in any way aided, by the answer. That pleading, besides general denial and plea of the statute of limitations, sets up an equitable defence by way of estoppel. But it is common knowledge that this may be done under our statutes, sections 5071 and 5782. It seems equally well settled that, unless a new, affirmative case is made by the defendant which requires a trial in advance of a trial on the plaintiff's cause of action, and, if found in favor of the defendant, would wholly supersede plaintiff's claim, the trial of the case made by the plaintiff is not affected. The equitable plea in this answer is a defence merely. If found in favor of the company, the effect would be simply to defeat a recovery. See *Smith v. Anderson*, 20 O. S. 76; *Buckner v. Mear*, 26 O. S. 514. Nor do the allegations of the reply change or aid the plaintiff's case in chief. For that we look to the petition, not to the reply. New matter therein set up for the first time can not avail.

It results that the case tried in the court of common pleas was an action for the recovery of specific real property. Section 5130, Revised Statutes, requires that causes of this nature shall be tried by a jury unless a jury trial be waived. In such action no right of appeal exists, for, under section 5226, the right to appeal is limited to actions in which the right to demand a jury did not exist; and the tacit waiver of the right to demand a jury, and submission to the court, can not change the character of the action. That, as we have already found, is to be determined by the nature of the action itself.

There was no error in dismissing the appeal. *Judgment affirmed.*

GILES v. LYON.

COURT OF APPEALS OF NEW YORK, APRIL, 1851.

[4 N. Y. 600.]

GARDINER, J.¹—The suit was commenced in the supreme court in December, 1848, and was subsequently transferred to the superior court in the city of New York, as appears by the pleadings, and the captions of the decrees made in the cause, in pursuance of the 47th section of the amended code of 1849. By that section, the supreme court is authorized, by order, to transfer to the superior court, all civil suits *at issue* at the passage of the act, (12th April, 1849,) that *from and after* the first of May, 1849, shall be placed *upon* the *calendar* of the supreme court in the city of New York, and which shall be *in readiness for hearing* on *questions of law only*, or are *equity cases*. That the cause was not in readiness for a hearing when transferred is clear; because the appellant

¹ The reporter's statement of the case and a part of Judge Gardiner's opinion are omitted.

had distinctly put in issue, by his answer to the complaint, the representative character of the respondents. That fact was indispensable to the relief sought, and must be established before there could be a decree that the defendants interplead. Again, the decree recites that the cause was heard on the pleadings, and the documentary proofs taken at the hearing in the superior court. The suit, therefore, was neither "in readiness for hearing" in the supreme court, nor did its determination involve "questions of law only."

The remaining question is, was it an equity case, within the meaning of the above section? The 69th section of the code declares, that the distinction between *actions* at law and suits in equity, and the *forms* of such actions and suits, shall be abolished; and thereafter there should be one form of action for the protection of private rights, &c., which should be denominated a "civil action." The preamble to the act declares, "that it is inexpedient that the distinction between legal and equitable remedies should be longer continued." This was the great object to be obtained by those who framed and those who adopted the code; and it should be kept steadily in view by those who are called upon to interpret and apply its provisions.

The legislature by the section above quoted, sought to accomplish the object indicated in the preamble, by abolishing the formal distinction between law and equity. They were to be blended and formed into a single system, which should combine the principles peculiar to each, and be administered thereafter, through the same forms, and under the same appellation. After ordaining a new name for all proceedings to be thereafter instituted, for the redress of private grievances, the legislature could not have intended to annul their own work by another provision in the same act, and forming a part of the same system. The code took effect in July, 1848. It was amended in 1849, when the forty-seventh section was made part of it, and the whole was then adopted as a single act of legislation. The statute did not interfere with suits commenced prior to, and pending on the first of July, 1848; nor in general, with the former practice applicable to them. They were known and distinguished under the old system, as suits at law and equity cases, and they were thus designated under the new.¹ The phrase "equity cases," therefore, occurring in the forty-seventh section, must be confined to suits in equity commenced prior to July, 1848, and then pending in the supreme court. The accumulation of causes of this character in the former court of chancery, and the embarrassed condition of the new courts, particularly those in the first district, in consequence of their transfer to them, was notorious; and one great object in creating a new branch of the superior court was, to relieve the supreme court of that district from the burden of investigating and determining causes which were not properly their own. The forty-seventh section was designed as a remedy for the difficulty and framed

¹ Sess. Laws 1849, p. 705, § 2; 706, § 3.

accordingly. It is in terms limited to suits *at issue* at the passage of the act, of which it is a part.

This in effect, would confine the operation of the provision to suits in equity, pending on the first of July, 1848, as very few cases under the new system, would have been commenced and put at issue, during the intervening period. But however this might have been, they were not, "equity cases." None thus distinguished could be commenced, put at issue, or upon the calendar, after the first of July.¹ There could be no complainant—the distinctive appellation of the prosecuting party under the old system of practice.² By the construction suggested the forty-seventh section is sensible and consistent with the subsequent provisions and the general design of the statute.

On the other hand, if "equity cases," as the respondents insist, is held to include *all* suits in which the relief sought is of an equitable character, the legislature are made to confer a power upon the supreme court, by reviving a distinction and adopting a nomenclature in one section, which they had expressly abolished in another of the same statute. A repugnancy so absolute between different parts of the same system, should be avoided if possible. We think it may be, and are all of opinion that the authority of the supreme court, under the forty-seventh section, is limited to equity cases commenced under the former practice; that they consequently had not the right to divest themselves of jurisdiction in the present case, or to confer it upon another tribunal.

The judgment of the superior court must therefore be reversed, and the cause remitted to the supreme court for further proceedings.

Judgment reversed.

¹ § 69. ² § 70.

II. THE CIVIL ACTION AND THE SPECIAL PROCEEDING.

The Original Terms of the Statute.

NEW YORK, *Code of 1849*:¹ Remedies in the courts of justice are divided into 1. Actions, 2. Special proceedings. (§ 1.) An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence. (§ 2.) Every other remedy is a special proceeding. (§ 3.)

The Present Terms of the Statute

NEW YORK: The word "action," as used in the New Revision of the Statutes, when applied to judicial proceedings, signifies an ordinary prosecution, in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence. (*Code of Civ. Pro.* § 3333.) Every other prosecution by a party, for either of the purposes specified in the last section, is a special proceeding. (*Ibid* § 3334.)

CALIFORNIA: Judicial remedies are such as are administered by the courts of justice, or by judicial officers empowered for that purpose by the constitution and statutes of this state. (*Code Civ. Pro.* § 20.) These remedies are divided into two classes: 1. Action; and 2. Special proceedings. (*Ibid* § 21.) An action is an ordinary proceeding [and thence (§§ 22, 23) as in the New York Code of 1849, §§ 2, 3].

KENTUCKY: Civil cases are actions or special proceedings. (*Civ. Co. of Prac.* § 1.)

A civil action is a demand, by pleadings, in a court of justice, for the enforcement of an alleged right of a plaintiff against a defendant. (*Ibid* § 2.) Every other civil case is a special proceeding. (*Ibid* § 3.)

IOWA: Every proceeding in a court is an action, and is civil, special or criminal. (*Code, 1897*, § 3424.)

A civil action is a proceeding in a court of justice in which one party, known as the plaintiff, demands against another party, known as the defendant, the enforcement or protection of a private right, or the prevention or redress of a private wrong. It may also be brought for the recovery of a penalty or forfeiture. Every other proceeding in a civil case is a special action. (*Ibid* § 3425.)²

WISCONSIN: [As in New York Code of 1849, §§ 1, 2, 3] (*Wis. Stats.* 1898, §§ 2594, 2595, 2596).

KANSAS: [As in New York Code of 1849, §§ 1, 2, 3] (*Kan. Gen. Stats.* 1897, *Code of Civ. Pro.* § 2).

NORTH DAKOTA: [As in New York Code of 1849, §§ 1, 2, 3] (*Rev. Codes, N. D.*, 1895, §§ 5155, 5156, 5157).

SOUTH DAKOTA: [As in New York Code of 1849, §§ 1, 2, 3] (*Annotated Stats. S. D.*, 1899, §§ 6010, 6011, 6012).

¹ There was an earlier form, of one year's duration, in the New York Code of 1848 (§§ 1, 2, 3), where, instead of the definition of "action" as "an ordinary proceeding in a court of justice by which, etc.," it was declared that an action "is a regular judicial proceeding in which" etc., as in this amendment of 1849.

² "Special proceeding," in the code of 1873, § 2506.

NORTH CAROLINA: [*As in New York Code of 1849, §§ 1, 2, 3, with the addition of the phrase "or prevention" after the word "punishment"*] (*N. C. Code, 1883, §§ 125, 126, 127*).

ARKANSAS: Remedies in civil cases are divided into two classes: *First*. Actions. *Second*. Special proceedings. (*Digest of Stats. 1894, § 5601.*)

A civil action is an ordinary proceeding in a court of justice by one party against another for the enforcement or protection of a private right, or the redress or prevention of a private wrong. It may also be brought for the recovery of a penalty or forfeiture. (*Ibid, § 5602.*)

Every other remedy in a civil case is a special proceeding. (*Ibid § 5603.*)

SOUTH CAROLINA: [*As in New York Code of 1849, §§ 1, 2, 3*] (*Rev. Stats., S. C., 1893, §§ 1, 2, 3*).

BARGER v. COCHRAN.

SUPREME COURT OF OHIO, DECEMBER TERM, 1864.

[15 O. S. 460.]

The case is stated in the opinion of the court.

Green & Penn, for petitioner.

Milton S. Clark and R. D. McDougal, for defendant.

BRINKERHOFF, C. J.—This is a petition filed in the court of common pleas, for partition *under the statute*; and is not a civil action under the code, in the nature of a bill in chancery, for partition. After decree in the common pleas, it seems that all the steps necessary to perfect an appeal from that court to the district court were duly taken, and the case was, in the district court, reserved for decision here. No question seems to have been made in the district court, and none has been made by counsel here, as to whether an appeal lies in such a case. But, if an appeal does not lie, we have no jurisdiction of the case.

By the fifth section of the act of April 12, 1858, "to relieve the district courts," etc., the right of appeal is confined to "final judgments, orders, or decrees in *civil actions*, in which the parties have not the right, by virtue of the laws of this state, to demand a trial by jury, and interlocutory orders dissolving injunctions rendered by any court of common pleas in this state in which it has original jurisdiction."¹

The term "civil action," embraces only such cases as were, before the enactment of the code of civil procedure, known as "actions at law" and "suits in equity;"² but a petition for partition under the statute, was never recognized either as an action at law or a suit in equity, and is not, therefore, a civil action under the code of civil procedure. It is a special statutory proceeding, the distinction between which and a civil action is everywhere recognized by the code. The case of *Knoup*

¹ 4 Curwen's St. 3088.

² Code, sec. 3.

v. Piqua Bank,¹ and *Mack v. Bonner*,² arose under statutes differing in phraseology from the one now in force on the subject of appeal from the common pleas to the district courts, and do not apply to the question here presented. *Appeal dismissed.*

Scott, Day, White, and Welch, JJ., concurred.

LINTON v. LAYCOCK.

SUPREME COURT COMMISSION OF OHIO, DECEMBER TERM, 1877.

[33 O. S. 128.]

The suit was brought to determine the plaintiff's right to an undivided seventh part of 212 acres of land, and to obtain partition and an account for rents.

DAY, J.—Two questions are presented for our determination: *First*. Was the case appealable? If so—*Second*. Was the plaintiff a devisee under the will?

1. The statute under which the appeal was taken provides that "*civil actions*" in which neither party has the right to demand a trial by jury may be appealed. A proceeding under the special act to provide for the partition of real estate, not being a civil action, is not appealable.³

But this case is not a proceeding under that act. Its provisions have not been pursued, nor are they adequate for the object sought to be attained. The code of civil procedure has been pursued in the case, and, in every respect, it purports to be a civil action. Moreover, the special statutory mode of obtaining partition, never was exclusive of that in equity, by civil action under the code. Partition was always a subject of equity jurisdiction, especially where the case involved the settlement of questions peculiarly cognizable in courts of equity.

The case involved the construction of a will, upon which the right to the partition sought depends, and for an account of rents, if the plaintiff was entitled to partition. It was not a case for partition merely, and therefore could not properly have been brought under the partition act. It was, then, a proper case in which to invoke the equitable aid of the court in procuring the partition and account sought.

The action being for partition and an equitable account incident thereto, and not for the recovery of money or specific real property, neither party had the right to demand a jury trial: therefore, the case was appealable.⁴

¹ 1 Ohio St. 603.

² Citing *Barger v. Cochran*, 15 O. S. 460.

³ 3 Ohio St. 366.

⁴ Part of the case is omitted.

CHINN v. TRUSTEES, ETC.

SUPREME COURT COMMISSION OF OHIO, DECEMBER TERM, 1877.

[32 O. S. 236.]

Error to the District Court of Lawrence County.

W. H. Enoch, for plaintiff.

Neal & Cherrington, for defendants.

SCOTT, J.—The plaintiff in error applied to the District Court of Lawrence county for a writ of mandamus, commanding the defendants in error to execute and deliver to him a township bond of said township of Fayette, for one hundred dollars, in compliance with the requirements of the act of April 16, 1867, "to authorize and require the payment of bounties to veteran volunteers," and the acts amendatory thereof.

The facts stated in his relation, were such as to bring his case, *prima facie* at least, within the purview of said statute, and to entitle him to such bond. He avers in his relation that since the year 1867, he has often requested the trustees of said township, and their successors in office, including the present board of trustees, to draw, perfect, and deliver to him such bond, which they have refused, and still refuse to do.

His application was made to the district court, August 9, 1873. The defendants answered, and for their first defence alleged

"that the cause of action on which plaintiff's application is based, accrued to him against the defendants, more than six years prior to the commencement of this suit, by the said plaintiff, and so, they say that said action is barred by the statute of limitations."

To this defence the relator demurred. The court overruled his demurrer, and thereupon dismissed the case at his costs. For alleged error in this action of the court below, the plaintiff here prosecutes his petition in error.

The code of civil procedure limits the time within which an action can be brought "upon a liability created by statute, other than a forfeiture or penalty," to six years.¹ This provision is found in title 2, of the code, the object of which is to define and prescribe "the time of commencing *civil actions*." The civil action of the code is a substitute for all such judicial proceedings as, prior thereto, were known, either as actions at law or suits in equity.² By section 8, the limitations of this title are expressly confined to *civil actions*. But proceedings in mandamus were never regarded either as an action at law or a suit in equity, and are not therefore a civil action within the meaning of the code. Mandamus is an extraordinary or supplementary remedy, which

¹ Sec. 14.

² Sec. 3.

can not be resorted to if the party has any other adequate, specific remedy. The code provides for and regulates this remedy, but does not recognize it as a civil action. It declares that the writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law.¹ And in section 577, it provides that: "No other pleading or written allegation is allowed than the writ and answer."

These are the pleadings in the case, and have the same effect, and are to be construed, and may be amended in the same manner as *pleadings in a civil action*; and the issues thereby joined must be tried and the further proceedings thereon had in the same manner *as in a civil action*." This language clearly implies that mandamus is not comprehended within the civil action of the code, to which alone the limitations of title 2 are applicable as an absolute bar.

In holding otherwise, we think, the court below erred, and its judgment must, therefore, be reversed.

We do not, however, mean to intimate that because there is no statutory limitation of the time within which a writ of mandamus may be obtained in this state, a party may delay his application therefor at pleasure, without detriment to his rights. Where the relator has slept upon his rights for an unreasonable time, and especially if the delay has been prejudicial to the defendant, or to the rights of other persons, the court, in the exercise of a sound discretion, may well refuse the writ. In a case in New York, where the relator sought, by mandamus, to have judicial proceedings set aside, the court refused the writ, because of an acquiescence in the proceedings for one year.² In another case, it was held that mandamus might be brought within the time fixed for the limitation of other similar or analogous remedies.³ The justice and equity of this rule would, in many cases, be questionable.⁴ What *laches*, in the assertion of a clear legal right, would be sufficient to justify a refusal of a remedy by mandamus, must depend, in a great measure, on the character and circumstances of the particular case.

These circumstances may often be fully developed only on the trial of the case, as the statute permits no reply to the answer of the defendant. For the purpose of the demurrer, in this case, the relator admits a delay of six years. But for all other purposes, such delay is to be regarded as denied. How long, and under what circumstances, the relator has slept upon his rights, and what prejudice, if any, has resulted therefrom to the defendants, or to other persons, are facts to be ascertained upon the trial of the case, and considered by the court,

¹ Sec. 570.

² *The People ex rel. v. Seneca Common Pleas* (1829), 2 Wend. 264; Cf. *People ex rel. v. Common Council of Syracuse* (1879), 78 N. Y. 56; *People v. Supervisors* (1852), 12 Barb. 446, 450.—*Ed.*

³ *The People v. The Supervisors of Westchester*, 12 Barb. 446.

⁴ *Moses on Mandamus*, 190.

in determining whether such *laches* is disclosed, as to justify a denial of the remedy sought.

The judgment of the court below will be reversed, the demurrer of plaintiff to the first defence of the defendants be sustained, and the case remanded to the district court for trial upon its merits.¹

Judgment accordingly.

NOTE AS TO THE SPECIAL PROCEEDING.

An occasional departure by the codes from their general principle of one form of action was to be expected. The novel or peculiar nature of some substantive rights may naturally be reflected in statutory proceedings specially designed for their enforcement or protection; *ex parte* or non-controversial proceedings also may as naturally result in peculiar forms of procedure. Such exceptions appear in all the codes. But most of them go further, and permit exceptions which are apparently unnecessary or unnatural. In more than one instance, it is as if the reformers had grown weary in well doing, and had left unfinished their task of establishing uniformity in our judicial procedure.

For these exceptions the name given by the New York Act of 1848 and several other codes, the name of "special proceedings," has come into very general use; and, as in these codes, such proceedings are commonly grouped as a sole co-ordinate class with "actions." But in other codes there is no express recognition of this classification, such civil proceedings as do not come within the definition of the civil action being left at large, without a common name. Whether so named or not, the two classes are separated by a line which is often arbitrary, sometimes faintly drawn, and sometimes of little moment. There are however cases in which the distinction is of high consequence. For not only do the rules of practice differ, more or less, in regard to motions and orders, depositions, amendments, the service of papers, etc., as the suitor brings a civil action or a special proceeding, but in some states at least much more substantial differences exist between the two classes—as in the right of appeal, the application of the statute of limitations.

To a very considerable extent there is nothing in the nature of things which requires a materially different mode of pleading for the Special Proceeding than for the Civil Action. And so it has come about that the codes show a great diversity in their enumeration of "Special Proceedings." A complete list of those in any one state would have little exactness in other code states. Not only so, but in one and the same state it has sometimes happened that a proceeding which was deemed

¹ "A proceeding under section 1254 of the Code upon appeal from the assessment of damages by a sheriff's jury, for private property taken by a railway company for its right of way, is a *special proceeding*, and is not subject to the operation of section 2529 of the Code, limiting the time for the commencement of actions to recover for injuries to property to five years after the cause of action accrued." *Hartley v. Keokuk & Northwestern Railway Co.* (1892), 85 Iowa 455, 456.

to be "special" when the code was enacted, and is still named among its "special proceedings," has in effect become, through statutory amendments, a "civil action." Moreover, a civil action may branch out into special proceedings; and, on the other hand, there are special proceedings which at one stage or another are "transmuted into actions," or brought within the regulations applicable to civil actions by reason of special enactments which, with the innocent intention of simplifying the procedure, declare, in one form or another, that a special proceeding shall be from such a point, or in such a respect, subject to the provisions regulating civil actions.¹

The tendency of late years, however, both in code legislation and code decisions, is evidently towards an assimilation of the special proceeding with the civil action. The commissioners who framed the New York Revised Statutes of 1876, made it their rule to convert the most important special proceedings into actions if this could be done conveniently; when such a course was not open, the provisions which had embraced the civil action alone were applied, as far as practicable, to special proceedings.² Similar changes in the interest of uniformity have been made, to a greater or less extent, in other code states, and more are to be expected.

Lists of special proceedings are, therefore, to be taken with some allowance, even in states to whose codes they purport to have special reference. But subject to this caution, the following instances will serve to indicate the general character of the whole group of remedies which lie outside the range of the civil action.

The earlier codes generally did not seek to bring the great writs of *mandamus*, *prohibition*, *certiorari*, *habeas corpus*, and *quo warranto* within the definition of the civil action, but for the time being left them, with other proceedings, as they were.³ And excepting *quo war-*

¹ Cf. Austin Abbott's note to *McLean v. Jephson* (1890), 26 Abb. N. C., 40, 44, with special reference to the New York Code.

² See Throop's note to N. Y. Code of Civil Procedure, § 3333, ed. 1890.

³ The hesitation of the reformers here was illustrated in the framing of the Ohio code, five years after the enactment of the code of 1848: "Until the legislature shall otherwise provide, this code shall not affect proceedings on *habeas corpus*, *quo warranto*, or to assess damages for private property taken for public uses; nor proceedings under the statutes for the settlement of estates of deceased persons; nor proceedings under statutes relating to dower, divorce, or alimony; or to establish, or set aside a will; nor proceedings under statutes relating to apprentices, arbitration, bastardy, insolvent debtors; nor any special statutory remedy not heretofore obtained by action; but such proceedings may be prosecuted under the code, whenever it is applicable." (Sect. 604 of Commissioners' draft.) The provision was followed by this comment from the commissioners: "There are a great many special proceedings given by statute. These will continue, where they are not expressly modified or abolished. We have enumerated some of them, such as *habeas corpus*, the proceedings to assess damages for private property taken by corporations, and some others. These proceedings are very numerous. We have mentioned but a few of them. They include all statutory remedies and proceedings, not heretofore obtained by an ordinary action. It was impracticable and unnecessary to mention all of them in the code. We enumerate a few, chiefly for illustration; we might enumerate others for the same purpose, such as the act relating to common carriers, the act for executing contracts for land, where a party has died, the act relating to mechanics' liens, and the like." Note to Sect. 605, Commissioners' report on Ohio Code. (1853).

ranto which is often expressly designated in the code as an "action,"¹ these extraordinary remedies are still commonly classed with Special Proceedings.

The following are commonly differentiated by the terms of the codes from the Civil Action, and stated therefore as Special Proceedings: proceedings under the right of eminent domain for the acquisition of real estate, proceeding to alter the grade of a street, to drain land, to dissolve a corporation, or to change the name of a person, proceedings for divorce or alimony, or to assign dower, proceedings to submit a controversy without action, probate proceedings, proceedings in statutory arbitration, and summary proceedings to confess judgment, to obtain possession of real property, or to discharge one imprisoned on civil process.

The term Special Proceeding has been held to include also proceedings to enforce the statutory liens of mechanics and others;² proceedings in New York to remove a testamentary guardian,³ or by a receiver of taxes to compel payment of a personal tax,⁴ or in the statutory reference of a claim against the estate of a decedent;⁵ an application by a person not a party to an action of replevin, to be made a party, under the Wisconsin statute;⁶ a petition by an administrator for an order to sell real estate to pay debts, under the statutes of Indiana;⁷ proceedings in Iowa to disbar an attorney;⁸ proceedings in California with respect to escheated estates.⁹

¹ Cf. *State ex rel. v. Thompson* (1878), 34 O. S. 365, 366; *Reynolds v. The State ex rel.* (1878), 61 Ind., 392, 402.

² In *Hallahan v. Herbert* (1874) 57 N. Y., 409, it was held that the fundamental provision of the codes that "every action must be prosecuted in the name of the real party in interest" did not apply to a special proceeding under the New York mechanics' lien law of 1851, but that in case of an assignment by a lienor before the commencement of such a proceeding, it was properly prosecuted in his name for the benefit of the assignee.

³ *In re King* (1886), 42 Hun (N. Y.) 607.

⁴ *McLean v. Jephson* (1890), 26 Abb. N. C., 40.

⁵ *Paddock v. Kirkham* (1886), 102 N. Y., 597.

⁶ *Carney v. Gleissner* (1885), 62 Wis., 493, and see *Morse v. Stockman* (1885), 65 Wis., 36.

⁷ *Seward v. Clark* (1879), 67 Ind., 289.

⁸ *State v. Clark* (1877), 46 Iowa, 155.

⁹ Cal. Code of Civ. Pro. §§ 1269-1272.

C. *Effect of the Creation of the One Form of Civil Action, with Respect to the Distinctions of Substantive Law.*

NOTE.

Questions as to the practical effect in our law of the statute requiring one form of civil action were neither few nor speedily settled; the cases to which they give rise flow in a steady stream, from shortly after the inauguration of code pleading down to the present day.

The main cause for this should be kept in mind: our formulary system of actions was the framework about which our substantive law was built. From the beginnings of English law until but yesterday the forms of action fixed the lines of our whole legal theory. The practitioner, English or American, not only found these forms established in a venerable use, he daily resorted to them in testing the nature of a primary legal right or obligation. They dominated his view of the Law of Persons and the Law of Things; he framed his definitions of substantive rights according to the distinctions of his Law of Actions.

With the statutory abolition of the distinction between actions at law and suits in equity and the forms of all such actions and suits, it seemed to many that all classification in our law was swept aside. "The code," declared a well known lawyer in one of the earlier code states, writing as late as 1855, "reverses the scientific process, ignores all classification, and throws the whole science again into a single class, into a multitude of individual facts, without any law of aggregation or arrangement. The law started in the remote past from this point, and has, under the so-called spirit of reform, but really of destruction, again returned to it."¹

It has come about, therefore, that questions as to the practical effect of establishing one form of civil action in our law very often look beyond the limits of procedure, properly so called, and consider distinctions between substantive rights. Granted that the distinction between actions at law and suits in equity is abolished, is the distinction between law and equity abolished? If there are no longer "equitable actions" and "legal actions," as distinct classes,² is there nevertheless, as a practical question in pleading, a material distinction between equitable causes of action and legal causes of actions? If practitioners need not now distinguish between an action *ex delicto* and an action *ex contractu*, need they distinguish between a cause of action

¹ Nash, Pl. & Pr. 3, referring specially to the Ohio code of 1853, and generally to the seven codes which preceded it. See also Judge Selden's remark in *Voorhis v. Childs' Executor* (1858), 17 N. Y. 354, 358: "It is supposed by some that it was intended to abolish by the code all distinction, not only in form but substance, between legal and equitable actions; and it must be conceded that many of its provisions taken by themselves might seem to indicate such an intent."

Efroneous as these views are, they still serve a useful purpose in emphasizing the procedural character of the historic distinctions in our substantive law.

² See *Giles v. Lyons* (1851), 4 N. Y. 600.

ex delicto and a cause of action *ex contractu*? Or, in general, has the breaking down of the lines of separation between *actions* affected the distinctions between *causes of action*? And if these distinctions still endure, what effect, if any, have they upon the scope of the one form of action? Is the new civil action, thus substituted for the different actions at law and the suit in equity, in the nature of a vague general formula which, once uttered, opens the door to any relief within the facts of the controversy and the jurisdiction of the trial court? Or is there, in every civil action under the codes, a *theory of the action*, to which the court must look and by which it must limit the relief to be granted in that action, even if the facts of the controversy and the jurisdiction of the court would permit a more extensive or a different relief?

The cases which follow, while of one general class with those already given, bear more exactly upon such questions as these.

LINDEN & FRITZ v. HEPBURN & WILLS, IMPEADED WITH WEST.

SUPREME COURT OF NEW YORK, DECEMBER, 1850.

[5 *How. Pr.* 188.]

This case came before the court on an appeal from an order granting an injunction, and on another appeal from a judgment in favor of the plaintiffs on a demurrer to the complaint.

The case made by the complaint, was as follows: J. H. Roosevelt leased to A. & F. Roux for eight years from May 1, 1845, the premises known as No. 478 and 480 Broadway, New York. The lease was on the express condition that the premises were to be used only in a certain manner, and that certain enumerated uses should not be made of them; and there were covenants against making any alteration in the buildings, and a provision for re-entry for breaches of the covenants. In March, 1848, A. & F. Roux transferred the lease to the plaintiffs, who demised the principal part of 480 Broadway to the defendant West, for five years from May 1, 1848. West covenanted to observe and keep all the conditions in Roosevelt's lease. The lease to West reserved the rent to the plaintiffs, and provided for their re-entry for breaches of its covenants. Hepburn & Wills entered under West; and the defendants, or some of them, have broken the conditions of the lease in four specified particulars. The plaintiffs thereupon claimed that the lease to West had become forfeited, and prayed for judgment as stated in the opinion. The defendants Hepburn & Wills demurred, and the judge at special term gave judgment for the plaintiffs. He also on a previous motion,

granted an injunction order, restraining the defendants from continuing some of the inhibited uses of the premises.

J. Cochrane, for the defendants.

J. M. Knox, for the plaintiffs.

By the Court, SANDFORD, J.—The only ground presented by the demurrer, which requires any serious consideration is, that no right of entry exists in the plaintiffs; that the lease executed by them to West operated as an assignment of the original lease, *pro tanto*; and there being no reversionary interest in the plaintiff they can not recover. Whatever the effect of this lease might be as between West and the original lessor of the demised premises, we have no doubt that as between West and the plaintiffs, it is to be regarded as a sub lease, and not as an assignment of the original term. The right to re-enter was reserved to the plaintiffs, and suffices to enable them to enter for breaches of the conditions, although there be no reversion remaining in them.¹ The judgment for the plaintiffs on the demurrer, must be affirmed with costs.

On the appeal from the order granting the injunction, a different question arises. The complaint, after setting forth the violations of covenants and conditions for which the plaintiffs seek to recover, prays for a judgment of forfeiture of the term of years; that the defendants be, for that cause, dispossessed; and that the plaintiffs be put into possession of the premises. It then prays for an injunction to restrain the defendants from making alterations in the buildings, and from using them for retailing liquors, and in other modes prohibited by the covenants in the lease. The forfeiture and re-entry prayed, are the relief heretofore granted in the action of ejectment brought for the recovery of demised premises. The injunction asked, is purely equitable relief, heretofore given in a chancery suit, and in conformity to the principles of equity. The ejectment brought to effect a re-entry for breaches of the condition in a lease, has always been regarded in the law as a hard action—*strictissimi juris*; and the English chancery reports abound in cases in which the courts of equity have been importuned to relieve tenants against the forfeitures claimed in such actions. A proceeding like that before us, would never have been thought of under the system of remedies in force prior to the code of procedure. Equity abhors forfeitures and always relieves against them, when possible to do so; and no man would have ventured, under that system, to ask her for one of her most benign remedies, while, in the same breath, he demanded from her a rigorous forfeiture of his opponent's estate, in the subject of the controversy.

Does the code of procedure make any change in this respect? Can a plaintiff, under the code, ask for equitable relief, and in the same suit, demand a forfeiture? We are clear that the code has not altered the

¹ *Doe, ex dem. Freeman v. Bateman*, 2 B. & Ald., 168; and see *Kearny v. Post*, 1 Sandf. 105, affirmed on appeal, 2 Comst. 394.

rule. It has abolished the distinction between legal and equitable remedies ; but it has not changed the inherent difference between legal and equitable relief. Under the code the proper relief, whether legal or equitable, will be administered in the same form of proceeding. In some cases alternative relief may be prayed and relief be granted in one or the other form ; in which case an action at law was necessary before, to attain the one form and a bill, in equity to reach the other. A suit for specific performance is one of that description. But we think inconsistent relief can no more be asked now than it could under the old system. A vendor can not now exhibit a complaint demanding payment of an installment of purchase money in arrear, and also a forfeiture of the contract of sale, and restoration of the possession, even if the contract expressly provided for such payment and forfeiture. There can be no better illustration of our meaning than this very case. The forfeiture of the term, is a relief totally inconsistent with any equitable remedy. The lessor may pursue his remedy for a re-entry and possession ; or he may proceed for an injunction and damages, leaving the tenant in possession. He has an undoubted option to do either. He can not do both at once. "He that seeks equity must do equity," is a maxim which lies at the foundation of equity jurisprudence, and it is not at all affected by any change of remedies.

We imagine that a much broader effect has been claimed for the abolition of the distinction between legal and equitable remedies than was ever intended by the legislature. The first section of the code shows what was intended by the word "remedies." It is limited to actions and special proceedings, and the declared object of the preamble to the code is simply to abolish the distinction between legal and equitable actions. There is no ground for supposing that there was any design to abolish the distinction between the modes of relief known to the law as legal and equitable, or to substitute the one for the other, in any case. Those modes of relief, the judgment or the decree, to which a party, upon a certain state of facts, was entitled, were fixed by the law of the land. No inference or deduction from a statute, nothing short of a positive enactment by the legislature, could change them. The code contains no such enactment ; and we repeat, that we do not perceive in it any countenance for an inference or deduction to that effect. The chapter of the code relative to injunctions, in our judgment, does not affect the question. It substitutes an order for the writ heretofore used, and it defines the cases in which it may be granted ; the latter being the same, substantially, as were established in our Court of Chancery. It does not profess to create a new remedy. On the contrary, it recognizes the injunction as an existing provisional remedy ; provides the order in place of the writ, and regulates the mode of granting it. Its character, as a mode of equitable relief, is not at all altered or impaired.

Our conclusion is, that the plaintiffs had no right to an injunction, while they demanded a forfeiture of the lease. As the case made by

the complaint would entitle them to an injunction, if their relief had been limited to that remedy, together with damages, we will permit the injunction to stand, on their stipulating not to take judgment for a forfeiture, or delivery of possession of the premises; and they may amend their complaint so as to ask for damages. Unless they thus stipulate, the order for the injunction must be reversed.

HOWE v. PECKHAM.

SUPREME COURT OF NEW YORK, SPECIAL TERM, OCTOBER, 1851.

[6 *How. Pr.* 229.]

Demurrer to Complaint.—The complaint alleged that the plaintiff was driving a one horse wagon along the highway, and that a short distance behind the plaintiff a person was driving a two horse wagon in the same direction with plaintiff; that a short distance behind this person, was the defendant's team, drawing a two horse sled, and travelling in the same direction; that the defendant carelessly and negligently left his team to go along the said highway without any driver, and went and got into the wagon with the person driving between the plaintiff and the defendant's team, and rode with said person; and that defendant's team, being so left, started into a run and ran over the plaintiff, his horse and wagon, injured the plaintiff's person, broke his wagon and harness, and damaged the horse. The complaint, at the conclusion of the statement of the cause of action, averred that the injuries were occasioned by the "*gross and wilful carelessness and negligence of defendant.*"

A. N. Sheldon, for defendant. The complaint is drawn in violation of the 167th section of the Code. It contains two distinct and separate causes of action within the meaning of this section, to wit: injuries to *the person* and injuries to *the property* of the plaintiff.¹ Before the Code, actions were distinguished by their forms, now the forms of actions are abolished.² But while the Code has abolished these forms of actions, it has created, or preserved in fact, a distinction in one respect as to the forms of actions, and that is as to the *joinder of causes of action*; and these different divisions, made by the section in question, can not be joined any more than could *assumpsit* and *trespass* heretofore.

H. C. Goodwin and *J. P. Whittemore*, for the plaintiff.

MASON, JUSTICE.—There is no doubt in my mind in this case that the complaint states a cause of action in *case*, or what would have been an action upon the *case* under the former system of pleading and upon the principles of the common law. It is a complaint in which the plaintiff has made the negligence of the defendant the ground of action,

¹ Monell's Practice, 46 to 48.

² Code, § 60.

and in which the damages both to the plaintiff's person and his property are claimed as a consequence of the negligence, or as resulting from the negligence complained of.

This was a familiar mode of declaring under our former system, for the rule is well settled by a long series of adjudications, both in England and in this country, that in this class of cases if it appeared that the injury was attributable to negligence, though it were immediate, the party injured has an election either to treat the negligence of the defendant as the cause of action and to declare in *case*, or to consider the act itself as the injury, and declare in *trespass*.¹

And it should be borne in mind that where the injury resulted from the one negligent act of the party, as in the present case, it constituted but one cause of action. The running against the plaintiff's carriage in the highway and breaking it, and upsetting the plaintiff and injuring him by the careless negligence of the defendant never constituted but one cause of action, in which the plaintiff recovered his damages as well for his personal injury as for the injury of his property. This is a salutary rule, for when an injury has resulted both to the person and the property of the plaintiff from one single act of negligence of the defendant the law ought not to be guilty of so great a folly as to compel the plaintiff to sustain the burden and expense of two suits to recover his damages; and the courts which have been so fastidious to avoid circuity of action ought not to require it unless the innovating spirit of the legislature has required it by the passage of a statute which compels the courts thus to divide up claims for damages resulting from a single act. The defendant's counsel insists that the 167th section of the Code imposes this rule upon the courts. I feel constrained to say, however, after a most careful examination of this statute and the best deliberation which I have been able to bestow upon the case, that I do not think that this statute has the effect which the counsel for defendant attributes to it. The section reads as follows: "The plaintiff may unite several causes of action in the same complaint when they all arise out of, 1. Contract, express or implied. 2. Injuries with or without force to the person. 3. Injuries with or without force to the property," &c. And then follows this provision: "But the causes of action so united must all belong to one only of these classes," &c. I do not discover anything in this section which requires a plaintiff to sever a single cause of action. The demurrer in this cause is not well taken, in my opinion, for the reason that the plaintiff has not united several causes of action in the same complaint. He has only stated one cause of action. This section was never intended, it seems to me, to sever a cause of an action like that set forth in the complaint. The legislature in using the term "*several causes of actions*," in this section, must have had reference to

¹ Williams v. Holland, 10 Bing. R. 112, 117; Blin v. Campbell, 14 J. R. 433; Wilson v. Smith, 10 W. R. 328; 1 Chitty's Pl. 127, 128.

the causes of action as they were then founded, limited, and defined by the common law; for there was no other resort to ascertain what constituted a cause of action.

The rule is a familiar one, that statutes are to be construed with reference to the principles of the common law in force at the time of their passage, for it is not to be presumed that the legislature intended to make any innovations upon the common law farther than the case absolutely required.¹

This 167th section instead of severing causes of an action as they existed at the time of the passage of the statute, and thereby creating a multiplicity of suits, was, I have no doubt, intended by the framers thereof to lessen suits and diminish their number by allowing the plaintiff to bring into the same suit and recover his damages for half a dozen, or any greater number of assaults and battery committed upon distinct and different occasions, and so for any other injury to the person, he may join in the same action with assault and battery.

But, again, the Code does not abolish in any manner the causes of action as they existed before the passage of that act, nor does the Code in any manner define what shall constitute a cause of action. It leaves all this matter as it was at common law or in equity before the Code was passed. It is true the 69th section has abolished the forms of the action, but it leaves, as we have before said, the causes of action as they were; and the Code was never intended to trench upon their boundaries so far as the cause of action is concerned. The cause of action in *case* is as perfectly preserved under the Code, although the form of prosecuting the particular action is abolished, as it existed before the Code, or if it suits the individual of the code language any better, we will say that the form of the action upon the *case* is abolished, while the substance of the action in all its elements is most perfectly retained.

If I am right in the opinion above expressed, it follows that the plaintiff must have judgment upon the demurrer, which I hereby order to be entered, with leave to the defendant to answer the complaint on payment of costs.

¹ 4 Kent, Com. 464, 3d ed.

CROPSEY v. SWEENEY.

SUPREME COURT OF NEW YORK, GENERAL TERM, MAY, 1858.

[27 Barb. 310.]

Appeal from an order made at a special term, overruling a demurrer to the complaint. The action was brought by the plaintiff to recover for services rendered by her for James Ridgeway, deceased, in his lifetime, while she and Ridgeway were living together as husband and wife, and supposing themselves to be such, in pursuance of a marriage valid in point of form. The marriage afterwards turned out to be void, however, in consequence of Ridgeway having a previous wife, living at the time. The defendant, who, as public administrator, administered upon the estate of Ridgeway, after the death of the latter, demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action.

By the Court, SUTHERLAND, J.—Unless the code, by abolishing the distinction between actions at law and suits in equity, and the forms of such actions and suits, and of pleadings theretofore existing, intended to initiate, and has initiated, new principles of law, by which a class of rights and of wrongs, not before the proper subjects of judicial investigation and remedy, can now be judicially investigated and remedied, the facts stated in the plaintiff's complaint in this action do not constitute a cause of action, and the demurrer of the defendant to that complaint is well taken. I am not aware that any one has ever claimed for the code, or charged against the code, a mission, or purpose, so bold, novel, sweeping, and dangerous. It cannot be supposed that the abolition, in words, of the distinction between actions at law and suits in equity, by the code, was intended to break up the well settled fundamental principles and limits of common law and equitable jurisdiction, and open to courts, as proper subjects of judicial discretion, a class of moral wrongs, or misfortunes, not before the legitimate subjects of legal or equitable investigation or redress. Nor can it be supposed that the abolition of the forms of actions was intended to create or justify novel and unprecedented *causes* of action.

Although the form of the action of *assumpsit*, and of the pleadings therein, has been abolished, yet the obligation of contracts, and the distinction between an express and an implied *assumpsit* remain; and notwithstanding the code, in a large class of cases, now as before the code, it is only on the theory of an implied *assumpsit*, "inferred from the conduct, situation, or *mutual relations* of the parties," that justice can be enforced, and the performance of a legal duty compelled.

It is no longer necessary, and perhaps not even proper in such a case, for the plaintiff to *allege in his complaint* any promise on the part of the defendant, but he *must state facts* which if true, according to

well settled principles of law, would have authorized him to allege, and the court to infer, a promise on the part of the defendant, before the code. The form of assumpsit is no longer necessary, or perhaps even proper, in such a case; but facts sufficient to raise it, and to put it on paper, were it lawful to do so, are still necessary.

It follows, from what has been said, that the principal question raised by the demurrer in this case is, there being no express promise pretended or alleged in the complaint, whether the law implies a promise from the facts therein stated.

The action is for services rendered by the plaintiff for James Ridgeway in his lifetime, while the plaintiff was standing in the supposed relation of wife.

It is alleged in the complaint, that the marriage ceremony was solemnized in due form of law, between the plaintiff and James Ridgeway, in 1821, she believing that they were lawfully married, and living and cohabiting with him as his wife. That on or about the 15th September, 1821, proceedings were instituted in the court of chancery, of this state, against James Ridgeway, for divorce, by Catherine Ridgeway, to whom, under the name of Catharine Dob, he had been married, in the year 1812, and from whom he had separated in 1815. That on or about the 13th day of June, 1822, a decree was made, dissolving the marriage between the said Catharine and James. That about the summer of 1825, the marriage ceremony was again solemnized, in due form of law, between the said plaintiff and the said James Ridgeway. That before and at the time of the ceremony of marriage in 1825, the plaintiff was informed, and believed, that the said James Ridgeway was competent to contract marriage with the plaintiff, and that no impedient existed, and that the plaintiff believed that the marriage was valid until after the death of James Ridgeway. That from the time of the first marriage ceremony until James Ridgeway's death, in 1847, the plaintiff and the said James lived and cohabited together as husband and wife, and were known and reputed as such. That at the time of the first marriage ceremony, James Ridgeway was a carpenter, and possessed of property not exceeding \$1,000 in value. That the plaintiff, in addition to her ordinary household duties, and the usual care and management of the domestic affairs of James Ridgeway, labored to promote the success of his undertakings, and to procure the means of defraying the household expenses, and in the conduct and management of the domestic affairs practiced the utmost economy. That the said James was successful in his business, and accumulated a fortune, which at the time of his death amounted to \$150,000. That during the entire period the plaintiff so lived and cohabited with James Ridgeway, she had the entire management of his domestic affairs, and labored, by industry, economy, care, and attention to her duties, to promote his interests and success; and that it was owing to her efforts that he was enabled to accumulate so much property. That during the same period she bore

unto him twelve children, eight of whom are living. That prior to the marriage of James Ridgeway with Catharine Dob, he had once been married, and had issue by both marriages. That one child, Eliza Ann, wife of Jeremiah Rowland, and one grandchild, George W. Ridgeway, surviving issue of his deceased son Joseph, the issue of his first marriage, and one grandchild, the sole surviving issue of a daughter by his second marriage, claim to be the only lawful heirs of James Ridgeway, and entitled to his estate.

The plaintiff claims that the services rendered by her to James Ridgeway, in and about the management of his household affairs, and otherwise, as in the complaint set forth, were rendered at his request, and were reasonably worth forty thousand dollars; and she demands judgment for that sum, with interest from 21st Nov. 1847. It is not alleged in the complaint that James Ridgeway, in his lifetime, ever knew or supposed, after the last marriage ceremony, that the plaintiff was not his lawful wife; nor is it alleged that when his first supposed marriage with the plaintiff took place, he knew that his wife Catherine was living, and he unable to contract a legal marriage with the plaintiff.

No doubt, from the time of the first marriage ceremony to the institution of the suit for divorce, and from the time of the second marriage ceremony until his death, James Ridgeway and the plaintiff both supposed they were lawfully married, and that he lived and died supposing the plaintiff was his lawful wife. Now, after his death, upon the assumption that his supposed marriage was not legal, will the law permit us, or authorize us, to turn this supposed relation of husband and wife into the relation of master and servant, and thus infer or imply a promise on the part of James Ridgeway, in his life, to *pay*, and an expectation on the part of the plaintiff to *receive pay*, for the services rendered by the plaintiff while so standing in the supposed relation of husband and wife? The very ground upon which the plaintiff's case appeals so strongly to the sympathies of the court forbids any such fiction, inference, or implication. Her own (no doubt truthful) story of her long, devoted, faithful love, and services, as a *wife and mother*, will not permit us to say that she is legally entitled to receive pay for those services as a *servant*.

True, the law will not presume that work or labor performed as a *servant or laborer* was voluntary, and performed without any view to compensation; but the law can not presume that the domestic and household work and services of a wife for a husband are performed with the view to pay as a servant or laborer.

The law would do injustice to the plaintiff herself, by implying a promise to pay for these services; and respect for the plaintiff herself, as well as for the law, compels us to infer and hold that these services were performed not as a servant, with a view to pay, but from higher and holier motives; and that therefore her complaint does not constitute any cause of action.

Order reversed.

LUBERT v. CHAUVITEAU.

SUPREME COURT OF CALIFORNIA, OCTOBER, 1853.

[3 Cal. 458.]

The suit was brought by a resident of Bordeaux, in France, who complained that about the 7th September, 1850, he shipped in the ship *Salome*, bound from Bordeaux to San Francisco, a quantity of merchandise, (describing it,) and assigned the same to Hugens Brothers, commission merchants of San Francisco, or their order; that said merchandise duly reached its port of destination, and was placed, by the handing over of the bill of lading, in the hands of the defendants, commission merchants of said city, by the said Hugens Brothers, the consignees of the plaintiff, to sell and dispose the same to the best advantage, for the sole use and benefit of the plaintiff, and that defendants agreed to render a just and true account of the sales, and to pay the proceeds thereof to the plaintiff or his agents.

And plaintiff shows that defendants received this merchandise, according to the understanding above stated; that they sold and disposed of the whole, or the greater part thereof; and that they refuse to pay over the net proceeds, or any part thereof, though often requested by the agents of the said plaintiff. Judgment is asked for \$2,500, the value of the said merchandise, and for costs.

The answer of the defendants denies all the allegations in the bill

The facts in this case were as follows: In September, 1850, the plaintiff shipped a quantity of merchandise, sardines, white gum, prepared peas, and cloves, which he consigned to the house of Hugens Brothers, commission merchants, San Francisco, with instructions to sell the goods for cash, and to remit the proceeds, in bills or gold, to the plaintiff. In August, 1850, Hugens Brothers incurred liabilities to the amount of \$5,000, to the defendants, commission merchants and bankers, doing business in San Francisco, which they failed to meet at maturity. In December, 1850, the defendants required of Hugens Brothers additional security for the debt; and they finally pledged, conditionally, two bills of lading, on the way from France, one of which was the duplicate of the plaintiff's goods. The understanding was that the defendants should hold these securities until Hugens Brothers could place securities of their own in lieu of them. At the time the pledge was made to defendants, they were told by Hugens Brothers that the goods mentioned in the bill of lading of one vessel, the *Salome*, belonged to the plaintiff, and that they had no interest in

or lien upon it; that plaintiff was in no way indebted to them. At the same time Hugens Brothers showed to the defendants the letters of instruction from the plaintiff. Some time after the pledge above mentioned, Hugens Brothers placed in the hands of defendants a large consignment of goods, arrived by the ship *Julius*, which defendants agreed to receive in place of the bills of lading pledged above.

This consignment was received by defendants as a full payment of all the indebtedness of Hugens Brothers. A short time after this, the ship *Salome* arrived, and defendants were requested to hand over the bill of lading or give a permit to land the plaintiff's goods. They positively refused to do either, and insisted on holding the goods until the merchandise of the *Julius* was sold, and their account with Hugens Brothers was closed.

At the time of the demand and refusal, plaintiff's goods were worth \$4,500 or \$5,000; the sardines alone were sold for \$3,500 by Hugens Brothers, but could not be delivered to the purchaser, owing to the refusal of defendants to deliver them. The defendants had exclusive control of the goods, and they afterwards sold the greater part thereof. By the account of sales made, and from the evidence of defendant's clerk, it appeared that the sardines and peas sold for \$3,112.92.

Defendants' counsel moved for a nonsuit, on the ground that the proof did not support the complaint. The motion was overruled, and exception taken.

The defendants then proved that the white gum, cloves, and one case of preserved peas, were destroyed by fire in May, 1851, and that they had paid duties and custom-house charges on the goods, to the amount of \$910.50. Plaintiff's counsel contended that these charges could not be proved under the pleadings. The court admitted the proof, and the plaintiff excepted. Defendants proved that the rate of commission on the sale of goods, in 1850 and 1851, was ten per cent; which plaintiff objected to, but the Court admitted the proof, and plaintiff excepted. Defendants offered to give in evidence an account of the sales of the goods by the *Salome*, taken from their books, and offered to produce the books of the firm; this the Court rejected, and defendants' counsel excepted.

The Court charged: 1. If the jury believed that the goods of the plaintiff were pledged by Hugens Brothers, to secure a debt of their own, with knowledge on the part of the defendants, at the time the pledge was made, that the goods belonged to the plaintiff, the plaintiff was entitled to a verdict.

2. If they found affirmatively on the first proposition, it was for them, exclusively, to say what amount the plaintiff was entitled to recover; and as to the said amount they were limited only by the \$2,500 claim in the complaint; but in making up the amount they were to leave out the goods destroyed by fire, as the plaintiff waived any claim for them; that they should ascertain what the goods were worth at the

time of demand and refusal, or what they sold for, after deducting the expenses and charges set up by the defendants, if they should find said charges and expenses true, and render a verdict for said amount, but limited by the amount claimed.

Defendants' counsel excepted to the charges, and asked the court to charge: 1st. That if the goods were delivered by Hugens Brothers to the defendants to be sold by them, and the proceeds of sale placed to the credit of Hugens Brothers, the plaintiff is not entitled to recover. This the court refused.

2nd. The counsel of defendants argued that the evidence went to support an action *ex delicto*, and that the complaint was an action *ex contractu*, and asked the court to instruct the jury that, if they believed the evidence did not sustain the contract as laid in the complaint, the defendants were entitled to a verdict. The court refused, and defendants excepted.

The jury found for the plaintiff \$2,500, and the court ordered judgment accordingly, with costs, etc. Defendants appealed.

No brief for appellants.

W. H. Sharp, for respondent.¹

The opinion of the court was delivered by WELLS, Justice, HEYDENFELDT, Justice, concurring.

The first assignment of error is, that the evidence does not support the contract as laid in the complaint, and therefore that the court erred in refusing to order a nonsuit.

The plaintiff in the court blow waived the *tort*, (if any had been committed) and brought his action against the defendants as factors, to account for goods sold by them, and to restore the amount of the net proceeds arising from the sale. This he had a right to do, according to well-established principles of the common law, and it was competent for him to introduce evidence showing the manner in which the defendants became possessed of the goods; and although the proof should establish the fact that the defendants became possessed of them wrongfully, it would still be sufficient to maintain an action against the defendants as consignees or factors for the net proceeds.

One of the objects sought by the reformation in the forms of pleading was to provide for cases like the present. The distinctions in the form of actions *ex delicto* and *ex contractu* are abolished, and one form of action only substituted, and the plaintiff here has brought his action in the form prescribed by the Code; but the principles of law which govern the case remaining unchanged, he introduced testimony to maintain his action as he would have done under the common law system of practice in an action of assumpsit, based upon a similar state of facts; and the court committed no error in refusing a nonsuit, either on the ground of variance or insufficiency of proof to sustain the complaint.

¹ Respondent's argument is omitted.

But the plaintiff having elected to proceed against the defendants as factors, instead of *tort feorsors*, he thereby ratified the act of his agents, Hugens Brothers, in transferring the merchandise and the bills of lading into the hands of the defendants, and the defendants, who were commission merchants, as shown by the complaint, must be considered as acting as the authorized consignees and commission merchants of the plaintiff, and entitled to the rights and benefits arising from this relation. It follows that the plaintiff could only recover from the defendants the net proceeds arising from the sale and disposition of the merchandise, after deducting the necessary charges and disbursements; and the court erred in admitting proof of the value of the goods at the time of the demand and refusal to deliver.

The defendants are not charged with non-performance or negligence, nor with fraud in the sale, and no cause is shown why they were not entitled to commissions. The strict measure of damages, therefore, was the net proceeds after deducting the necessary charges, disbursements, and commissions; and the court erred in refusing to admit in evidence the books of defendants' firm to prove the account of the sale of the goods. It was not necessary, as is insisted upon, for the defendants, who were recognized by the plaintiff as factors, and prosecuted as such, to set forth in their answer those charges, disbursements, and commissions, either as new matter, or by way of set-off, to a claim for the net proceeds of the sale. And the court erred in charging the jury that it was for them exclusively to say what amount the plaintiff was entitled to recover, or that the defendants were liable for the value of the goods at the time of the demand and refusal. Therefore, in order that these errors may be corrected, the judgment of the court below is set aside, and a new trial ordered.¹

RICHARDSON AND WIFE v. MEANS.

SUPREME COURT OF MISSOURI, MARCH TERM, 1856.

[22 Mo. 495.]

This was an action commenced June 17, 1853, by Maria L. Richardson (the husband having afterwards been made a party by an amended petition) for the recovery of a female slave and her two children, alleged in the petition to have been wrongfully taken by the defendant, May 1, 1849, and unlawfully detained by him.

Defendant, in his answer, denied the title of plaintiff, and claimed title in himself, and relied upon a bill of sale to himself, dated May 1,

¹ This case was reheard by order of the court, and the above opinion was re-affirmed, December 5th, 1853.

1848, of the negress and one child, executed by Thomas R. Richardson, husband of plaintiff Maria, and co-plaintiff in this action.

To sustain the wife's right, she relied on a deed of gift from her father, William C. Bruce, dated April 1, 1845, by which in consideration of love and affection toward the plaintiff, his daughter, he conveyed the female slave in controversy to one Littleton Jozner, "upon trust that the said Jozner, his executors, &c., shall permit my said daughter to hold possession of and take the use, hire, and profits of the said Maria and her increase to her sole and separate use during her life, independent of her said husband; and at the death of my said daughter, the said Maria and her increase to be equally divided between her children," &c.

The bill of sale mentioned above, dated May 1st, 1848, was introduced and proven by defendant.

The jury found for the defendant, and judgment was given accordingly. Plaintiff appealed.

Cates, for appellant.

Glover & Richardson, for respondent.

LEONARD, J.—We can not reverse this judgment, no matter how much we may regret that parties, by a slip in the form of proceeding, should subject themselves to costs and delay in the judicial enforcement of their rights. The instructions given are correct in point of law, and this seems to be admitted; but the objection is, that the one given by the court upon its own suggestion, was not warranted by any evidence in the cause, and that, although correct in the abstract, it had the effect of misleading the jury. If this could be made apparent to us, it might furnish sufficient ground for reversing the judgment in a case where the reversal would avail the party. Here, however, the plaintiffs have stated themselves out of court, and therefore, if the jury were misled, it resulted in no injury to them; for the reason that, according to their own showing, they had no case entitling them to recovery. The plaintiffs' title is derived from the instrument of gift executed by the father, which vests the legal ownership in the trustee for the use of the wife during her life, and upon her death for the use of her children, and the action is to redress a wrong done to the legal ownership, being substantially an action for the conversion of the plaintiffs' slaves. Under the old form of proceeding, this action must have been brought by the trustee at law; but if, from any cause, the legal ownership could not have been made effectual for the protection of the wife's equitable right, the courts would, at her suit, upon a proper statement of facts, all the necessary parties being before them, have administered the appropriate equitable relief. But it is supposed that all this is changed by the new code, which is true to some extent. It must be observed, however, that the code has not changed the rights of parties, but only provided new remedies for their enforcement; it has not abolished the distinction between equitable and legal rights,

but the distinction between legal and equitable remedies, so far, at least, as to provide that one form of suit shall be used for the enforcement of both classes of rights. The case made upon the record was for legal relief; but the case made by the plaintiff, in proof, was of a different character.

It was the duty of the trustee to protect the legal ownership from violation, and to preserve the property for the use of the parties beneficially interested as they should respectively become entitled; and if, as before remarked, there were any obstacles in the way of the legal remedy, or the trustee refused to do his duty, then, upon a proper case stated, and proper parties being made, the courts would, in a *revivisuit* under the code, afford relief according to the principles of equity; and the present judgment can not be pleaded in bar of any equitable relief that shall be thus sought by the wife.

The judgment must be affirmed.

WALTER v. BENNETT.

COURT OF APPEALS OF NEW YORK, DECEMBER, 1857.

[16 N. Y. 251.]

Appeal from the Superior Court of Buffalo.

The action was brought to recover the possession of a draft alleged to belong to the plaintiff and to be wrongfully detained by the defendant, and also to recover the possession of \$7,250 of money alleged to be the property of the plaintiff, wrongfully detained by the defendant. These claims are set out separately in the two counts of the complaint. The answer is a simple denial of the allegations of the complaint.

At the trial, before Mr. Justice Clinton and a jury, it was proved that the defendant was employed by the plaintiff to sell and deliver for him five hundred barrels of pork. As such agent, and in the course of his employment, the defendant sold and delivered the pork to Watson & Williams, of Montreal, who, in payment therefor, and in accordance with the terms of the sale, sent to the defendant the draft in question, payable to his order. The draft was drawn by the Bank of Montreal on the Bank of Commerce, in the city of New-York, for £1,812.10, Canada currency, at six days after sight and without grace, and was dated on the twenty-third day of September, 1854. On the twenty-sixth day of September the defendant indorsed the draft, took it to the International Bank of Buffalo, had it discounted, received the money upon it, or had it passed to his credit upon the books of the bank. The draft was paid at maturity to the International Bank by the Bank of Commerce, in whose possession it continued until the time of the trial. The plaintiff became aware, on the twenty-seventh of September, that Watson &

Williams had remitted the draft to the defendant in payment for the pork, and on that day he demanded it, or its avails, of the defendant, who then admitted that he had received the draft and refused to deliver it. The judge non-suited the plaintiff and ordered judgment for the defendant, which was subsequently affirmed at general term, and the plaintiff appealed to this court.

Amasa J. Parker, for the appellant.

John Ganson, for the respondent.

BROWN, J.—The question principally discussed by the counsel for the appellant was, whether an action will lie to recover the possession of personal property, when it appears that the defendant had parted with the possession of the property before the commencement of the action. The decision of that question is not necessary to the determination of the rights of the parties to this action, because it will be seen that the defendant's possession of the draft during all the time it remained with him was rightful, and in parting with and obtaining the money upon it he was pursuing the line of his duty. At no time was his possession of the draft unlawful or in hostility to the plaintiff, and in converting it into money he was in the plain and obvious execution of his trust as the agent and employee of the plaintiff. The relation between the parties rested in contract; for agency, under all the authorities, is a contract express or implied. Whatever responsibility attaches to the defendant, from his relation of agent, is upon the contract, and the plaintiff can not, by changing the form of his action, change the nature of the defendant's obligation, and convert that into a tort which the law deems to be a simple breach of agreement. The form of the plaintiff's action is *ex delicto*; and before he can recover he must show that the defendant committed a wrong, or, in other words, wrongfully withheld this draft from the true owner. Had the plaintiff terminated the agency and demanded the draft while it was in the defendant's hands, and before he had negotiated it with the bank, his claim would have stood on very different grounds. But the right to sell implied the right to receive the price of the goods, and, in receiving the draft in payment and realizing the money upon it, the defendant did what was right and was in the exact performance of his duty. The plaintiff must therefore take his remedy for the money in form *ex contractu*, or not take it at all.

*The judgment of the Superior Court should be affirmed.*¹

¹ JOHNSON, J., delivered a concurring opinion.

JONES AND WIFE v. STEAMSHIP CORTES.

SUPREME COURT OF CALIFORNIA, JANUARY, 1861.

[17 Cal. 487.]

Appeal from the Seventh District.

This is an action brought by Alexander Jones and Mary, his wife, against the steamship *Cortes*, to recover damages for the wrong committed by the agents and owners of the defendants, who for a valuable consideration paid them by Mrs. Jones, (before her marriage to Alexander Jones,) contracted to transport her from San Francisco to San Juan del Sur, and received her on board as a passenger, but instead of landing her at the port of San Juan, landed her at Panama.

The complaint, verified, avers that in March, 1856, the Accessory Transit Company were the owners of the steamship *Cortes* and other steamships, engaged as common carriers in the transportation of passengers and property between San Francisco and San Juan, in Nicaragua; that the authorized agents of the *Cortes*, at San Francisco, on March 25, 1856, contracted with Mrs. Jones, (then Mrs. Musgrove,) for the sum of fifty dollars paid by her, to transport her to San Juan on said steamship, to sail on said day; that the ship sailed on the appointed day, she being a passenger on board; that in due time the *Cortes* arrived in the harbor of San Juan, but did not and would not land the plaintiff Mrs. Jones there, but on the contrary, against her will, carried her to the port of Panama and landed her there amongst strangers, without the means of support or of proceeding on her journey, in an unhealthy climate and amongst a hostile population, where she was exposed to great dangers; that she was detained there ten days before any opportunity could be found for her to leave; that her object in going to San Juan was to attend to important business there, which required her personal presence, and that to arrive at San Juan, she was obliged to proceed to New York, and from there return to Nicaragua; and that the acts complained of were committed by the officers of the steamship, under orders from the owners; and judgment is prayed for ten thousand dollars damages, for losses and expenses sustained in consequence of her failure to arrive at Nicaragua in due season, (which are specifically averred and shown,) and of her forced journey to New York and thence to Nicaragua, and for her detention and suffering by reason of the fraudulent, wrongful, and malicious acts of the defendant.

The complaint further states, that at the time the defendant's agents at San Francisco entered into the contract with her, they knew that the contract between the owners of the steamship line and the Government of Nicaragua, under which the line had been running, had been annulled by the Government of Nicaragua; and the complaint narrates

certain facts explanatory of the action of the officers of the steamship in landing her passengers at a different port than the one to which they were destined, and of the reasons of such action.

Defendant demurred and answered at the same time, but proceeded to trial on the merits.

The answer alleges in substance, that while the *Cortes* was in the harbor of San Juan, the plaintiff Mary H. made no application to be landed there, and that it was with her consent that the *Cortes* proceeded to Panama; and denies that the deviation was wanton or malicious. As to all the other material allegations of the complaint, the agent who makes answer for the defendant states that he has no knowledge, or information sufficient to form a belief, and therefore denies them.¹

D. Lake, for appellant.

A. P. Crittenden, for respondent.

COPE, J., delivered the opinion of the Court—FIELD, C. J., concurring.

In 1856 the defendant was engaged in carrying passengers from the port of San Francisco, in this state, to San Juan del Sur, in Nicaragua, and the action is brought for the breach of a contract to convey the plaintiff, Mary A. Jones, who was then unmarried, from the former to the latter port, and for wrongs and injuries sustained by her in consequence of the violation of the agreement. The grievances complained of were occasioned by the voluntary action of the owners and agents of the defendant, and on trial of the case the plaintiffs were permitted to present the whole matter for the consideration of the jury. They were allowed to show among other things, that the contract was fraudulent in its inception, and that great mental and bodily suffering had been produced by the peculiar circumstances attending its infraction. The evidence established a most aggravated case of hardship and oppression, and a verdict was rendered for \$3,800 damages.

It is objected that the rule of damages adopted by the court below was erroneous, and the validity of this objection is the principal question submitted for our determination.

In actions founded upon a breach of contract, the common law adheres with great tenacity to the rule which excludes all inquiry into the motive or animus of the contracting parties, and limits the damages to the direct pecuniary loss resulting from the breach. But there are instances, says Chitty, in which the defendant may be regarded in the light of a wrongdoer in breaking his contract, and where this is the case a greater latitude is allowed the jury in assessing the damages.² It was held by the Constitutional Court of South Carolina, in an action of *assumpsit*, that the existence of fraud was sufficient to warrant the jury in departing from the ordinary rule upon this subject. "Assumpsit," said Court, "is *nomen generalissimum*, under which a great variety

¹ Part of the reporter's statement of the case is omitted.

² Chitty on Cont. 767.

of special cases are embraced. It includes every case by simple contract, whether in the nature of a warranty, a promise to pay money, or an undertaking to do or perform any act from whence a promise, either express or implied, can arise. The damages to be recovered must always depend on the nature of the action and the circumstances of the case. The difference of opinion which seem to exist on the subject, we apprehend, has arisen from confounding the distinctions between the different forms of *assumpsit*. In an action for money had and received, the actual amount of money received, with interest in some cases, should be the measure of damages. In an action for goods, or any specific chattel, sold and delivered, the value of the thing sold; and so in all other cases which furnish a standard by which the jury can be governed. But in cases of fraud, and other cases merely sounding in damages, the jury may give a verdict to the whole amount of the injury sustained, or imaginary damages." *Rose v. Beattie*, (1820) 2 Nott & McCord, 538, 541.

This case was subsequently approved in *Garret v. Stuart*, 1 McCord, 514.

Sedgwick, in his work on the measure of damages, combats this doctrine with great earnestness and ability. After discussing the matter at some length, he says: "On the whole, therefore, notwithstanding the cases cited in the notes, and the authority of the tribunals by which they are decided, I conclude that so long as our present forms of action and rules of pleading and evidence exist, their clear and irresistible result is, that the damages in actions of contract are to be limited to the consequence of the breach of the contract alone, and that no regard is to be had to the motives which induce the violation of the agreement."¹ But in a note on the same page, he adds: "I am far from desiring to express any opinion in favor of the doctrine of the text; on the contrary, if the plaintiff in an Anglo-Saxon court of justice shall ever be permitted to state his complaint according to the actual facts, and not be compelled to use an unmeaning formula, I can see no reason, greatly as legal relief would be thus extended, why exemplary damages should not be given for a fraudulent and malicious breach of contract, as well as for any other willful wrong."

In the present case, it is not important to inquire which of these opinions, in relation to the rule at common law, is correct. The injuries complained of were of such a character that redress may undoubtedly be obtained in some form, and under our practice there is no reason why the plaintiffs should be compelled to resort to different actions for the relief to which the law entitles them.

We have but one form of action and nothing more is required than a statement in ordinary language of the facts relied upon for a recovery. The statute makes no distinction in matters of form between actions of contract and those of tort, and relief is administered without reference

¹ Sedg. on Dam. 208.

to the technical and artificial rules of the common law upon this subject. Different causes of action may be united in the same complaint, and the only restrictions upon the pleader in this respect are those imposed by the statute. Our system of pleading is formed upon the model of the civil law, and one of its principal objects is to discourage protracted and vexatious litigation. It is the duty of the courts to assist as far as possible in the accomplishment of this object, and it should not be fritted away by the application of rules which have no legitimate connection with the system. The provisions for avoiding a multiplicity of suits are to be liberally and beneficially construed, and we see no reason why all matters arising from and constituting part of the same transaction should not be litigated and determined in the same action. Causes of complaint differing in their nature, and having no connection with each other, cannot be united, but the object of this rule is to prevent the confusion and embarrassment which would necessarily result from the union of diverse and incongruous matters, and it has no application to a case embracing a variety of circumstances so connected as to constitute but one transaction. The statute provides that a claim for injuries to the person shall not be joined with a claim for injuries to character. In a case in New York, involving the construction of a similar provision in the code of that state, it was held that a demurrer to the complaint, the facts stated being sufficient to sustain an action either for assault and battery or for slander, was not well taken. The court said: "The complaint, in fact, contains a single cause of action. The allegations relate to a single transaction. The complaint purports to give the history of one occurrence, and no more. This history embraces what was done and what was said on the occasion. Each constitutes a part of the *res gestae*. What is alleged to have been done, would, if established upon the trial, sustain an action for personal injury. What is alleged to have been said, would, if established upon the trial, sustain an action for injury to the reputation. The whole together, constituting as it does a single transaction, makes but a single cause of action. The plaintiff brings his action upon the whole case, to recover damages for the compound injury he has sustained . . . When it comes to trial, all that was said and all that was done become the proper subjects of investigation, and a single verdict adjusts the rights of the parties."¹

In *Robinson v. Flint*, 16 How. Pr. 240, a cause of action on tort was united with a cause of action on contract, and it appearing that these causes of action arose out of the same matter, it was held that they were properly united. The code contains a special provision upon this subject, but we think that the effect of our statute is the same, and that the construction would not be altered by the incorporation of a similar provision. Having adopted a system which rejects all distinctions in matters of form, it would be folly to subject it to the operation of

¹ *Brewer v. Temple* (1857), 15 How. Pr. 286.

rules founded upon distinctions of this nature. Every action under our practice may be properly termed an action on the *case*, and it would seem that any ground of relief which can be regarded as a part of the case, may with propriety be included in the action.

These views are decisive of the question presented in this case, and there is no necessity for a more particular reference to the points made by counsel. The objections to the verdict are based upon the distinction at common law between actions of contract and those of tort, and this distinction, and the rules founded upon it, are alike inapplicable to our practice. The plaintiffs have brought their suit upon the whole case, to recover damages not only for the breach of the contract, but for the wrongs and injuries committed by the owners and agents of the defendant in that connection. The defendant is liable for all the damages resulting from these causes, and there is certainly no impropriety in adjusting the whole matter in one controversy. There was no error in permitting the plaintiffs to give evidence of the fraud practiced in the inception of the contract. The tendency of the evidence on this point was to show a predetermination not to carry out the agreement, and there is no doubt that this was a proper subject of consideration in connection with the tortious acts subsequently committed. If these acts were such as the law could not recognize for the purposes of redress, the admission of this evidence would probably be sufficient to reverse the judgment; but under the circumstances we do not see upon what principle it could have been rejected. It was proper that the whole case should be submitted to the jury, and damages awarded commensurate with the injuries sustained. It was a case of unmitigated hardship, and the acts complained of were not only unnecessary, but without any excuse or palliation whatever. They were acts of willful oppression, and it would be a reproach to the law if nothing could be recovered but the mere pecuniary loss resulting from the breach of the contract.

We think that no principle of law has been violated, and that the jury exercised proper discretion in assessing the damages.

Judgment affirmed.

DIXON *v.* CALDWELL.

SUPREME COURT OF OHIO, DECEMBER TERM, 1864.

[15 O. S. 412.]

Error to the district court of Ross County.

The defendant in error, Caldwell, was the owner of a military bounty land warrant, No. 31,694, for 160 acres, issued to him by the government of the United States, under the act of congress of February 11, 1847. Shortly after he received it, the warrant was fraudulently obtained from him, and replaced by a spurious or forged warrant, which, for a long time, he supposed genuine.

Without the knowledge or consent of Caldwell, the genuine warrant was sold and assigned to George Dixon, Jr., the plaintiff in error, by some person who represented Caldwell and forged his name thereto. Dixon, being ignorant of the fraudulent manner in which the warrant had been obtained, and ignorant also of its forged assignment, on the 7th day of February, 1849, purchased the warrant, and paid therefor \$130, believing the assignment to be the genuine assignment of Caldwell, and that, by his purchase, he was acquiring full and complete title to the warrant.

Having thus in good faith acquired, as he supposed, the warrant, Dixon, without any notice of the fraudulent manner in which it had been obtained, or of the forgery, located the same upon the land described in the petition, and obtained a patent therefor before the commencement of the original suit.

Upon this state of fact Caldwell sought to charge Dixon, as his trustee, for the land so located; and, in his petition, prayed for a conveyance of the portion of the lands remaining unsold; for an account of the proceeds of the part which had been sold, and for a judgment against Dixon for the amount found, with interest; also for an account of the rents and profits.

In the common pleas Dixon was adjudged to be a trustee of the plaintiff for the lands; and the relief prayed was granted. The judgment was, on error, affirmed by the district court; to reverse this judgment of affirmance is the object of the present petition in error.

W. H. Safford, for plaintiff in error.

Alfred Yable, for defendant in error.¹

WHITE, J.—The distinction between legal and equitable rights exists in the subjects to which they relate, and is not affected by the form or mode of procedure that may be prescribed for their enforcement. The code abolished the distinctions between actions at law and suits in equity, and substituted in their place one form of action; yet, the rights and liabilities of parties, legal and equitable, as distinguished from the

¹ The arguments are omitted.

mode of procedure, remain the same since, as before, the adoption of the code. Dixon, the defendant below, is the legal owner of the land, in controversy, as patentee. This is conceded by Caldwell, the plaintiff below, but he claims to be the equitable owner, and that Dixon is his trustee, and, as such, in equity, bound to account for the proceeds of the portion of the land sold and surrender the remainder.

There is no pretence of an express trust; nor is it claimed that the defendant acquired the property in fraud or by other unfair means. The property, therefore, having been fairly acquired before a constructive trust can be raised in equity, and fastened upon the defendant, so as to convert him into a trustee for the plaintiff, the circumstances of the transaction must appear to be such, that it would be violating some principle of equity to allow the defendant to retain the legal title to the land for his own benefit.

The controversy here is not solely in regard to the land warrant. The legal title to that was clearly vested in the plaintiff, and for its conversion he had a plain legal remedy against the defendant for its value; and, before it was lost in entering the land, for its recovery in specie.

The question is, whether in the light of equity, the measure of legal relief is to be regarded as inadequate; and the defendant required, by a court of equity, to surrender the land to which he acquired the legal title in good faith, and, as he supposed for his own benefit, by the combined use of the warrant and his own means, industry, and enterprise.

The defendant claims to be a *bona fide* purchaser of the land in controversy for value, without notice of the plaintiff's rights; and relies for his defence upon the rules of equity for the protection of such purchasers.

The land warrant in question was assignable in law, was in the possession and apparent ownership of the vendor, and the assignment was regular in form. The defect in the vendor's title was not apparent, and there was no reasonable ground for suspicion that the assignment had been forged. The defendant purchased and paid full value for the warrant, and is not chargeable with a want of reasonable diligence in so doing. Having no reason to suspect the existence of the plaintiff's title to the warrant, he was, in equity and good conscience, chargeable with no duty toward him in relation to its future use. If he withheld it from entry, he would have been liable to return it to the plaintiff or pay him its value. The good faith of his purchase would have been no answer to the plaintiff's legal demand. After the location of the warrant, the holder of the legal title thereof acquired an equity in the land upon which the location was made; and before the defendant clothed himself with the legal title, and while the equities were open between the parties, Caldwell's equity, being older in time, would have been better in right. But Dixon, unaffected with fraud or notice, and upon a valuable consideration paid, having obtained the legal title to

the land in controversy, brings himself within the protection awarded in equity to the holder of the legal estate.¹

The conclusion, therefore, at which we have arrived, is, that Dixon cannot be required to surrender the legal title of the unsold land to the plaintiff below, nor to account for the proceeds of the part sold; and that the court erred, in requiring him to do so. But, as before stated, he is under a clear legal liability for the value of the warrant. The judgment of the district court, and of the court of common pleas, is therefore reversed, and the cause remanded to the common pleas for further proceedings.

BRINKERHOFF, C. J., and SCOTT, DAY and WELCH, JJ., concurred.

GWALTNEY *v.* CANNON.

SUPREME COURT OF JUDICATURE OF INDIANA, MAY TERM, 1859.

[31 *Ind.* 227.]

Appeal from the Gibson Common Pleas.

RAY, J.—Complaint by the appellee against the appellant for maintaining and providing for the wards of the latter.

The question is upon the sufficiency of the complaint, which is as follows:

"Edward Cannon complains of James Gwaltney, and says that heretofore, to wit, on the — day of —, 186—, the defendant was, by the Warrick Court of Common Pleas, duly appointed guardian of the persons and estates of Lafayette Gwaltney, John H. Gwaltney, Anna Gwaltney, and Noah Gwaltney, minor heirs of Noah Gwaltney, late of Warrick county, deceased; that said defendant qualified and took upon himself the burden of said trust as such guardian. And plaintiff further says that said defendant, as such guardian, is indebted to the plaintiff in the sum of \$679, for keeping, boarding, and clothing his said wards, and for money paid and expended for medical attendance on said wards, for three years, to wit, from the month of March, 1864, to the month of March, 1867; that said sum of \$679 is wholly unpaid. Wherefore, plaintiff asks for judgment for \$679, and other proper relief."

The defendant demurred to the complaint, for the following grounds of objections:

"1. That the complaint does not state facts sufficient to constitute a cause of action.

"2. That there is a defect of parties defendant."

The demurrer was overruled by the court, and exception was taken by the appellant at the time.

It is objected by appellant, that there is no averment that the expenditure for clothing, and medical attendance, and the boarding of the

¹ Part of the opinion is omitted.

wards, was at the request of the appellants, or upon any promise made by him to pay for the same. In answer to this objection, we are referred to the forms given by the statute, numbered 10 and 11, 2 G. & H. 376. These forms upon actions for goods sold and delivered, and materials furnished to the defendant, and for work and labor done for the defendant, do not require an allegation that the defendant promised to pay. But in all these instances the law implies the promise from the facts stated; and our statute simply requires the statement of facts, and if upon these facts the law implies a promise, the complaint will be good. But where the action is against one for goods sold to another, there the law does not imply a request or promise, and that averment must be made.

The case before us does not state facts which at law impose any obligation upon the guardian. There is no averment that he failed to provide, within the means in his hands as guardian, for the reasonable wants of his wards, and under such circumstances a volunteer can not render himself the creditor of the guardian.

The demurrer should have been sustained to the complaint.

*Judgment reversed, with costs; and the cause remanded for further proceedings.*¹

CONAUGHTY v. NICHOLS.

COURT OF APPEALS OF NEW YORK, MARCH 17, 1870.

[42 N. Y. 83.]

This is an appeal by the defendants from a judgment of the General Term of the Supreme Court, fourth district, reversing a judgment entered upon the report of a referee. The action was brought against the defendants as factors, to recover of them the proceeds of merchandise consigned to them for sale by the plaintiff. The plaintiff alleged in his complaint, and proved upon the trial, among other facts, that during the months of December, 1860, and January, 1861, the plaintiffs, who reside in Saratoga county, consigned to the defendants, who were commission merchants, doing business in the city of New York, a quantity of dried fruit and butter, to be sold by the defendants, and the net proceeds to be remitted to the plaintiff; that the defendants received and sold the said fruit and butter, realizing therefor \$690.82, and that, after deducting all the expenses of sale, there was due the plaintiff the sum of \$618.43, which he demanded of the defendants, who omitted and refused to pay the same to the plaintiff. The complaint contains the following allegation:

¹ Cf. *Woodford v. Leavenworth* (1860), 14 Ind. 311, 314.

"*And have converted the same to their own use*, to the damage of the said plaintiff of the said sum of \$618.43, for which said last mentioned sum the said plaintiff demands judgment against said defendants, besides interest, together with the costs of this action."

When the plaintiff closed his evidence the defendants' counsel moved for a nonsuit, upon the grounds:

1. That the action should have been brought in the name of the plaintiff and John H. Conaughty, as they were the owners of the property.

2. That the defendants were simply agents of the plaintiff and are only liable in an *action on contract*, and are not liable in an *action for a tort*.

3. That there was no conversion of the plaintiff's property by defendants.

4. That the plaintiff had failed to establish the cause of action set out in the complaint; and that there was a total failure of proof within the provisions of section 171 of the Code.

The plaintiff's counsel asked leave to amend the complaint by striking out the allegation, "that the defendants converted the money to their own use," &c.; and insisted that the action was upon contract. The referee refused to allow the amendment on the ground that the effect would be to change the form of the action from tort to contract; and nonsuited the plaintiff upon the ground that the cause of action stated in the complaint was for a tort, and the proof established a cause of action upon contract. The plaintiff's counsel excepted to the decision of the referee, and appealed to the General Term, where the judgment was reversed; the defendants appeal to this court.

Charles S. Lester, for the appellant.

William A. Beach, for the respondent.

INGALLS, J.—The plaintiff established a cause of action against the defendants upon contract, and was entitled to recover the amount of his claim, unless the referee was correct in holding that the complaint contained but one cause of action, and that was for a tort. If the words "*and have converted the same to their own use*" had been omitted in the complaint, it could not reasonably be contended, that the same was not adapted to the cause of action established by the evidence. The case, therefore, seems to be reduced to the proposition, whether the plaintiff, having alleged facts constituting a cause of action, and having sustained them by proof upon the trial, should have been nonsuited, because the pleading contained an allegation adapted to a complaint in an action *ex delicto*, and which was unnecessary to be stated or proved, to justify a recovery *on contract*. We are of opinion that no such rigid rule of construction in regard to pleading should prevail under the liberal system introduced by the Code. It is not only contrary to the express provisions of the Code, but at variance with the decisions which have been made, construing and enforcing the same. Section 140 of

the Code provides: "All forms of pleading heretofore existing are abolished." Section 142 prescribes what a complaint shall contain: "A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition." Section 169: "No variance between the allegation in a pleading and the proof shall be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defence upon the merits, &c." Section 159: "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view of substantial justice between the parties." Section 170: "When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs." Section 160 provides that irrelevant or redundant matter inserted in a pleading may be stricken out on motion; and the court may also require the pleading to be made more certain. From the foregoing provisions of the code, it is very apparent, that it was the intention of the legislature to reduce pleading to a plain statement of the facts constituting the cause of action or defence, with a claim for such relief as the facts justified; and to prevent the sacrifice of substantial right to mere form. The courts have generally been inclined fairly to give effect to the new system of pleading thus introduced, as will appear by reference to some of the decisions which have been made upon this subject. In *Jordan Plank-road v. Morley*,¹ Judge DENIO remarks: "In pleading under the code, it is sufficient to state the facts from which the law infers a liability, or implies a promise." In *Zabriskie v. Smith*,² the same judge says: "Under our present system of pleading, I conceive that a pleading should contain the substance of a declaration under the former system. It is sufficient, however, that the requisite allegations can be fairly gathered from all the averments of the complaint, though the statement of them may be argumentative, and the complaint deficient in technical language." In *Wright v. Hooker*,³ EDWARDS, J., says: "The very object of the new system of pleading was to enable the court to give judgment *according to the facts stated and proved, without reference to the form used, or to the legal conclusion adopted by the pleader.*" The reasoning of the court is to the same effect in *Olcott v. Carroll*.⁴ Although facts are stated in a pleading which are unnecessary to be proved to constitute a cause of action or defence, they may be disregarded upon the trial.⁵ Or they may be stricken out on motion before trial. In the case at bar, the complaint contained an ample statement of facts constituting a cause of action on *contract*, and such allegations were

¹ 23 N. Y. 553.

² 13 N. Y. 330.

³ 10 N. Y. 59.

⁴ 39 N. Y. 436. See also *Emory v. Pease*, 20 N. Y. 62; *Butterworth v. O'Brien*, 24 Howard, 440; *Goff v. Edgerton*, 18 Abb. 381; *Hall v. Hall*, 38 Howard, 97.

⁵ *Bedell v. Carll*, 33 N. Y. 581.

clearly supported by the evidence, yet the plaintiff was deprived of a judgment, because the complaint contained an allegation which was unnecessary to *such cause of action*, and which might well have been disregarded. The counsel for the appellant relies upon the case of *Walter v. Bennett*¹ to sustain the decision of the referee. In my judgment, that case, so far as the question of pleading is concerned, is in entire harmony with the decisions to which we have referred, and interposed no obstacle to a recovery by the plaintiff in this action. In *Walter v. Bennett*, the complaint is not set out, but the statement in regard to the form of the action is as follows: "The action was brought to recover the *possession of a draft* alleged to belong to the plaintiff, and to be wrongfully detained by the defendant, and also to recover *the possession of \$7,250 of money* alleged to be the property of the plaintiff, wrongfully detained by the defendant."

Judge Brown remarks: "The form of the plaintiff's action is *ex delicto*, and before he can recover he must show that the defendant committed a wrong, or in other words, wrongfully withheld the draft from the true owner." All that this case decides is that a party shall not be allowed to recover for a cause of action which is not alleged and proved. So far as that case discloses what the pleadings were, the plaintiff alleged simply a wrongful detention of a draft or of a sum of money, the possession whereof the plaintiff claimed, and, having failed to prove what was alleged, was nonsuited. That case does not hold that, when facts are stated constituting a cause of action on contract, a party should be nonsuited because the complaint contains an allegation suited to an action *ex delicto*; in other words, because the plaintiff stated too much in his complaint. If the complaint in question had merely stated facts sufficient to authorize a recovery for a wrongful detention of the money, and upon the trial, the plaintiff had applied to amend by inserting facts appropriate to a cause of action on contract, and thereby changing the form and character of the action, the application should have been denied. That, however, was not the case, as the facts were fully stated, and the defendants apprised of what they were to meet upon the trial, and there was no pretense that they were surprised. If they chose to accept the complaint without moving to strike out any portion of it, or to compel the plaintiff to make it more definite, or to elect in regard to the form of action, they should not, upon the trial, have been allowed to prevent a recovery by the plaintiff of a judgment for the amount of his demand.

It is further insisted by the counsel for the appellant that the summons is for relief, and therefore not adapted to a recovery in the form claimed by the plaintiff upon the trial. If so, the defendants' remedy was by motion. It is quite probable that the plaintiff intended, down to the trial, to recover against the defendants for a wrongful conversion of the proceeds of the sale of the property consigned to them,

¹ 16 N. Y. 251, ante, p. 101.

and doubtless the mistake should have been fatal but for the ample statement of facts contained in the complaint, which justified a recovery on contract for the amount of his demand. It does not follow that, because the parties go down to the trial upon a particular theory, which is not supported by the proof, the cause is to be dismissed, when there are facts alleged in the complaint, and sustained by the evidence, sufficient to justify a recovery upon a different theory or form of action. There is no substantial reason why, under such circumstances, a party should be turned out of court and compelled to commence a new action, thereby occasioning expense, delay and multiplicity of suits to accomplish a just result. It is against the spirit and letter of the code, and substantial justice is not promoted thereby. The judgment of the General Term should be affirmed with costs and judgment absolute entered in favor of the plaintiff.

All concur for affirmance.

Judgment affirmed and judgment absolute for plaintiff.

ROSS v. MATHER.

COMMISSION OF APPEALS OF NEW YORK, SEPTEMBER, 1872.

[51 N. Y. 108.]

Appeal from judgment of the General Term of the Supreme Court in the seventh judicial district, in favor of plaintiff, entered upon an order denying a motion for a new trial, and directing judgment upon verdict.¹

The action was brought to recover damages upon the sale of a horse. The summons in this case stated that the plaintiff would apply to the court for the relief demanded in the complaint.

The complaint alleged in substance that the defendant had sold to the plaintiff a horse which was lame in one hind leg; that on the sale the defendant warranted, and falsely and fraudulently represented, that the lameness resulted from an injury to the horse's foot, that it was in his foot, and nowhere else, that when his foot grew out he would be well, and that he had only been lame for two weeks; that the plaintiff, relying upon this warranty and representation, and believing them to be true, purchased and paid for the horse. It was further alleged that at the time of this warranty, and false and fraudulent representations, the horse was not lame in his foot, but in his gambrel joint, which had been for more than two weeks badly diseased, and from which his lameness originated, which the plaintiff, at the time of the sale and of making such warranty and representations, well knew; that the horse was of little value; and that by means of the promises the defendant

¹ Reported below, 47 Barb., 582.

falsely and fraudulently deceived him in the sale of the horse, to the damage of \$500; and he demanded judgment for \$500 and costs.

The answer admitted the sale of the horse and the payment of the price, and denied all the other allegations of the complaint.

On the trial the plaintiff stated that he expected to prove a warranty only; that he did not expect to prove any false or fraudulent representations, or that the defendant intended to deceive or did knowingly or fraudulently deceive the plaintiff, and that he should only claim to recover damages for a breach of the contract of warranty.

The defendant then moved that the plaintiff be nonsuited, on the ground that the cause of action stated in the complaint is for fraud and deceit, and not for breach of a contract of warranty. The judge denied this motion and the defendant excepted. A cause of action upon a warranty was then proven, but no evidence was given tending to prove fraud or any intention to deceive. The defendant then renewed his motion for a nonsuit upon the grounds before stated, which was denied, and he excepted. Exceptions were ordered to be heard at first instance at General Term.

Murray & Greene, for appellant.

E. A. Raymond, for respondent.¹

HUNT, C.—The complaint contains all the elements of a complaint for a fraud. It must be held to be such unless the distinction between the two forms of action is at an end. While it contains all that is necessary to authorize a recovery upon a contract, it contains much more. These additional allegations are so important and are stated in a manner so logical and orderly, that they determine the character of the action.

In addition to what is necessary to sustain an action upon contract, the complaint alleges: 1. That the defendant "fraudulently represented" that the lameness arose from an injury to his foot, and was temporary only. 2. That the plaintiff relied upon the warranty not only, but upon said representations, and believing them to be true, made the purchase. 3. That at the time of the warranty not only, but of the false and fraudulent representations, the horse was lame in his gambrel joint and not in his foot. 4. That at the time of making the false and fraudulent representations, the defendant well knew that the lameness was not in the hind foot, but was in the gambrel joint, which had been badly diseased for more than two weeks, which was also well known to the defendant. 5. That by means of the premises, the defendant falsely and fraudulently deceived the plaintiff in the sale of the horse, to his damage of \$500.

No allegations could have been inserted which would have more clearly constituted a case of fraud. That there was a warranty as well as representations, or that both are alleged to have existed, does not alter the case. Fraud may be based upon a warranty or upon represen-

¹ The arguments are omitted.

tations, or upon both together. They may exist severally or together, and either or both may be the subject of fraud, and of an action for damages for fraud.

If the plaintiff had been able to establish a fraud in the sale, I can not doubt that he would have been permitted to prove it under this complaint. I do not see upon what ground an objection could have been made to it. So, if the allegations of the complaint had been positively stated and had been verified, an order to hold to bail must have been granted upon an application made to the proper officer.¹

I do not find any authorities in the courts of this state which sustain the position that this complaint may be considered as an action for a breach of warranty. None of the cases cited by the respondent's counsel are to that effect.

In *Moore v. Noble*, 53 Barb., 425, the complaint alleged that the defendant falsely and fraudulently represented the horse to be of a certain value and guaranteed him to be sound and free from disease. The court held it to be an action for a fraud, and that to entitle the plaintiff to recover he must prove the *scienter*.²

Walter v. Bennett, 16 N. Y., 250, and *Belknap v. Sealey*, 14 N. Y., 147, are hardly authorities on the question of whether the complaint in this action is in tort or assumpsit. They are authorities on the proposition that where the complaint is for a tort, the plaintiff establishing a case in assumpsit merely can not recover.

The precedent in 2 *Chitty's Pleadings* (679, 8th Am. ed., from 6th Lond. ed.) and the case of *Williamson v. Allison*, 2 East, 446, are chiefly relied on by the respondent. The precedent cited in *Chitty*, which is for "a false warranty of a horse," does not sustain the claim. It omits the important allegation that the seller well knew the representation to be untrue. The precedent also at p. 279, "on a warranty of a horse to be sound," omits the same allegations. Both of these precedents contain the allegation used in all forms of assumpsit, that the defendant not regarding his promise, fraudulently intending to injure the plaintiff, craftily and subtly deceived the plaintiff.

The case of *Williamson v. Allison* is nearer to the point. The court hold that where all the allegations are made which are necessary to sustain an action in tort, if a warranty is also alleged, the tort may be disregarded and a recovery had in assumpsit. *Dowdny v. Mortimer*, cited in the same authority, held that the *scienter* must be proved, and in that case no express warranty was alleged. In my opinion, this case is not in accordance with the authorities and practice of this state, and should not prevail.

The view of this pleading which I have taken is in accordance with our improved system of pleading, abolishing all prior forms and requiring the party to make a "statement of the facts constituting the cause

¹ Code, §§ 179, 188.

² See also *Marshall v. Gray*, 57 Barb., 414; *McGovern v. Payn*, 32 Barb., 83.

of action."¹ In the present case, the plaintiff made a statement of facts which did not constitute his cause of action. The code never intended that a party who had failed in the performance of a contract merely, should be sued for a fraud, or that a party who had committed a fraud should be sued for a breach of contract, unless the fraud was intended to be waived. The two causes of action are entirely distinct, and there can be no recovery as for a breach of contract, where a fraud is the basis of the complaint.² *Conaughty v. Nichols*, 42 N. Y., 83, is the only authority cited to the contrary, and it does not sustain that position.

The judgment should therefore be reversed and new trial granted, costs to abide event.

LORR, CH. C. (*dissenting*). The question in this case is whether the plaintiff could recover on the proof of the warranty alleged in the complaint and its breach, without also proving guilty knowledge by the defendant of the falsity of the representations made by him.

That question was very fully considered in *Williamson v. Allison*, 2 East, 446. The plaintiff in that action brought twenty-four bottles of claret, for the purpose of being exported to a foreign market for sale. The declaration charged that the defendant, well knowing the wine to be in an unfit and improper state for exportation, and falsely and fraudulently warranting the same to be fit and proper, falsely, fraudulently, and deceitfully sold the same to the plaintiff, and by means of the premises, falsely and fraudulently deceived him.

At the trial the plaintiff did not prove knowledge by the defendant of the unfit condition of the wine, and it was contended that he could not recover, inasmuch as there was no proof of *scienter*, as laid in the declaration. The judge, however, held that the gist of the action was the warranty, and that the *scienter* alleged was mere matter of aggravation, and need not be proved. A verdict was rendered for the plaintiff, and a rule to show cause why it should not be set aside was thereupon granted, and upon its return and after argument, the rule was discharged. Lawrence, J., said with respect to what averments are necessary to be proved, he took the rule to be, that if the whole of the averment may be struck out, without destroying the plaintiff's right of action, it was not necessary to prove it; and he referred to a case before Lord Raymond, who held the *scienter* there alleged was not necessary to be proved, inasmuch as there was a warranty, and that the *scienter* was only necessary to be proved where the action was in the nature of an action of deceit without a warranty.

Le Blank, J., said that the insertion or omission of the fact of the defendant's knowledge, at the time, that the wine was unfit for sale according to the warranty, makes no difference, and that the allegation might, therefore, be struck out altogether.

¹ Code, § 142.

² See authorities, *supra*.

The rule laid down and adopted in that case is recognized by *Chitty*, in his work on Pleadings. He says, in speaking of an action on the case as a proper remedy for a false warranty, and in prescribing the requisites or qualities of a declaration in such an action, that it is not necessary that a *scienter* should be alleged, and, if stated, need not be proved, and cites *Williamson v. Allison*, supra.¹ His precedent or form of a declaration, in an action on the case for a false warranty on the sale of a horse, has been substantially adopted, and followed by the pleader in drawing the complaint in the action under review.²

It is said by the counsel of the appellant that, in that form, a *scienter* is not alleged. It is true that there is no express allegation of that fact, but it is alleged therein that the defendant falsely and fraudulently warranted the said horse to be sound, and quiet in harness, and it is well established that the words "falsely and fraudulently," when used to qualify the defendant's *animus* in making the representations, are equivalent to the formal statement, or constitute a sufficient allegation of a *scienter*, even in an action of deceit.³

The principle deducible from the rule referred to is that, if the representation relied on as the basis of the action constitutes a warranty, then, if the property warranted does not answer the description, the party injured has a right to recover, irrespective of the question of *scienter*. If, on the other hand, it is a false statement or affirmation, not amounting to a warranty, then an averment and proof of the knowledge of its falsity by the party making it are both necessary to give a cause of action.

The defendant, however, claims that whatever may have been the rule under the old system of pleading, the action, under the code and the present system, was clearly "for damages for the deceit, and that fraud was the gravamen of the action." There is no ground for this claim. All that is required by the code is a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition.

The complaint, in the present case, alleges a warranty, and false and fraudulent representations of the defendant as to the lameness of the horse sold by him and its cause, and that, relying upon said warranty and representations, and believing them to be true, plaintiff purchased him; and every allegation of false and fraudulent representations is preceded by an allegation of warranty.

It can not be said, after the plaintiff himself has alleged that he relied, in making his purchase, "upon said warranty and representations," that fraud was the gravamen of the action. That statement by him concedes and admits that the warranty influenced his action, at least to some extent, and no representations, except those constituting it, are

¹ See 3 American, from 2 London edition, vol. 1, pp. 139, 376, marginal paging.

² See vol. 2 of same edition, pp. 325, marginal paging.

³ See *Bayard v. Malcolm*, in the Court for the Correction of Errors, 2 Johns., 550, and *Thomas v. Beebe*, 25 N. Y., opinion of Selden, J., p. 246, and of Denio, Ch. J., p. 249, etc.

stated to have been made. Indeed, there is nothing set forth in the complaint to justify the inference or presumption that the plaintiff would have bought the horse on the representations alleged without the warranty, and if the statements that they were fraudulent or fraudulently made, and that the defendant knew they were false, were entirely omitted, the other facts stated a full and perfect cause of action against the defendant, and the omission to prove those statements did not, in any form or manner, or to any extent, qualify his liability. Being unnecessary and immaterial to the cause of action, they could have been stricken out, on motion, as irrelevant matters, and it was properly held on the trial that there was no necessity of proving them, and that the plaintiff was entitled to a recovery without such proof.

This principle is fully settled in *Conaughty v. Nichols*, 42 N. Y. 83.

It may be proper, in conclusion, to refer to the report of the decision in this case, in 47 Barb., 582. It is stated, in the statement of the case preceding the opinion of the court, that the complaint in the action alleged fraud and deceit in the sale of a horse by the defendant to the plaintiff; that the plaintiff made representations which he knew to be false, and that the defendant, by means of the premises, falsely and fraudulently deceived him (the plaintiff) in the sale of said horse as aforesaid to the damage of the plaintiff of \$500, for which judgment was demanded. No reference or allusion whatever is made in that statement to the allegations of *warranty* contained in the complaint, which, as was stated in the opinion of the court below and according to the views above expressed by me, made it a complaint for a false warranty of the horse, and not for deceit in the sale.

It follows, from what I have stated, that there is no ground for the reversal of the judgment. It must, consequently, be affirmed with costs.

All concur for reversal except Lott, Ch. C., dissenting.

Judgment reversed.

SUPERVISORS OF KEWAUNEE COUNTY *v.* DECKER.

SUPREME COURT OF WISCONSIN, JUNE TERM, 1872.

[30 Wis. 624.]

Action for recovery of money alleged to belong to the county of Kewaunee, and to have been converted by defendant Decker to his own use, he being the clerk of the plaintiff board of supervisors. The opinion states the case. Defendant demurred to the complaint for insufficiency, the demurrer was overruled, and defendant appeals.

Felker & Weisbrod, for appellant.

J. D. Markham (with *Gillet & Taylor*, of counsel), *contra*.

DIXON, C. J.—It would certainly be a most anomalous and hitherto unknown condition of the laws of pleading, were it established that the plaintiff in a civil action could file and serve a complaint, the particular nature and object of which no one could tell, but which might and should be held good as a statement of two or three or more different and inconsistent causes of action, as one in tort, one upon money demand on contract, and one in equity, all combined or fused and moulded into one count or declaration, so that the defendant must await the accidents and events of trial, and until the plaintiff's proofs are all in, before being informed with any certainty or definiteness what he was called upon to meet. The proposition that a complaint, or any single count of it, may be so framed with a double, treble, or any number of aspects, looking to so many distinct and incongruous causes of action, in order to hit the exigencies of the plaintiff's case or any possible demands of his proofs at the trial, we must say, strikes us as something exceedingly novel in the rules of pleading. We do not think it is the law, and, unless, the legislature compels us by some new statutory regulation, shall hereafter be very slow to change this conclusion.

Counsel for the defendant in this action suppose the complaint herein to be intended and to be one in *trover*, charging or seeking to charge the defendant with the wrongful conversion of certain moneys which came into his hands as a public officer, and which belonged to the plaintiff; and, acting upon such supposition, they have demurred to the complaint as not stating facts sufficient to constitute that cause of action. It would be unfair to say that the learned counsel for the plaintiff equivocate on that point, nor is it true that they take issue with the counsel for the defendant as to the nature of the complaint. They rather concede than otherwise, that the complaint is and was intended to be one in *tort* for the conversion, but they at the same time insist, that if it is not good as a complaint of that kind, it is sufficient as a complaint or count in an action for money had and received, and being sufficient for that purpose, they argue that the demurrer was properly overruled, and the order of the court below should be affirmed on that ground. In other words, their position is that it is a question now open to speculation and inquiry on this demurrer, whether, upon all or any of the facts stated in the complaint, taken collectively or separately, or even by severing the allegations themselves, so as to eliminate or discard certain portions of them as surplusage, a cause of action of any kind is or can be made out, and, if it be found that it can, then the demurrer should be overruled. To show that the complaint may be upheld as one for money had and received for the use of the plaintiff, and the action considered as one of that kind, counsel gravely contend that the averments that the defendant made fraudulent representations, and acted falsely, fraudulently, and wrongfully, in claiming and withholding the moneys, and that he converted the same, etc., may be disregarded and rejected as surplusage.

In support of this petition, counsel cited several New York decisions, and some in this court, where, *after trial and judgment, or after issue has been taken upon the merits, or after the trial has commenced and the plaintiff's case is closed*, it has been held that such allegations may be disregarded. The decisions were in actions like the present and others involving a somewhat similar question under the circumstances above stated, and were made in favor of a good cause of action, proved or proposed to be, and which by a fair and reasonable interpretation of the pleadings could be said to be within the scope of them, or to be fairly mapped out and delineated by the averments, so that the defendant was apprised of the demand made against him, and of the facts relied upon to establish it. The great liberality of the code, and the broad powers of amendment conferred and enforced upon the courts under such circumstances, are well known. It is declared that no variance between the allegation in a pleading and the proof shall be deemed material, unless it shall actually mislead the adverse party to his prejudice in maintaining his action or defence upon the merits, and that when the variance is not material, the court may direct the fact to be found in accordance with evidence, or may order an immediate amendment without costs. Most liberal provision is also made for amendments in other respects, by adding to or taking from the pleadings before or after judgment in furtherance of justice. Where an answer is put in, it is provided that the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue. And it is furthermore declared that the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party, and that no judgment shall be reversed or affected by reason of such error or defect. These provisions for the most part, if not entirely, relate to the proceedings in an action after issue joined on the merits, upon or after the trial, or after judgment on the merits, when the facts are made to appear and the substantial rights of the parties are shown. They are enacted in amplification and enlargement of the rules of the common law on the same subjects, by which it is well understood there were many defects, imperfections and omissions, constituting fatal objections on demurrer, which were cured after issue joined, and a trial or verdict and judgment on the merits. The cases cited by counsel are all of them manifestly such as fall within these provisions and rules, and none of them touch or have any bearing upon the question or case here presented.¹ No case arising upon demurrer to the complaint is cited, and it is believed none can be, holding any such doctrine as that contended for. Most of the cases were where no objection was taken until after issue joined and trial had and judgment rendered on the merits, and then the objection was brought forward as a ground of reversal, and generally in the appellate court, that the plaintiff had

¹ Cf. *Giffert v. West* (1873), 33 Wis. 617, 622.—Ed.

declared in tort and recovered on contract, or *vice versa*, or had sued in equity and recovered judgment at law, or that equitable relief had been granted in an action commenced and tried as one on the law side of the court. In all the cases the objection had been waived by failure of the party to take it properly and in season, and under the liberal powers of amendment and curative provisions of the code, it was held that the proceedings or judgments, just in themselves, should not be disturbed upon points of mere form. Further or more particular comment upon the cases is deemed unnecessary.¹

It thus appears that the authorities relied upon do not sanction the position, that a complaint in the first instance and where challenged by demurrer,² may be uncertain and ambulatory, purposely so made, now presenting one face to the court and now another, at the mere will of the pleader, so that it may be regarded as one in tort, or one on contract, or in equity, as he is pleased to name it and the necessities of argument require, and if discovered to be good in any of the turns or phases which it may thus be made to assume, that it must be upheld in that aspect, as a proper and sufficient pleading by the court. As already observed, the opinion of the court is quite the contrary. We have often held that the inherent and essential differences and peculiar properties of actions have not been destroyed, and from their very nature can not be.³ These distinctions continuing, they must be regarded by the courts now as formerly; and now no more than then, except under the peculiar circumstances above noted, can any one complaint or count, be made to subserve the purposes of two or more distinct and dissimilar causes of action at the option of the party presenting it. It cannot be "fish, flesh, or fowl" according to the appetite of the attorney preparing the dish set before the court. If counsel disagree as to the nature of the action or purpose of the pleading, it is the province of the court to settle the dispute. It is a question when properly raised which cannot be left in doubt, and the court must determine with precision and certainty upon inspection of the pleadings to what class of actions it belongs or was intended, whether of tort, upon contract, or in equity, and, if necessary or material, even the exact kind of it within the class must also be determined.⁴

¹ Citing, however—*Barlow v. Scott*, 24 N. Y. 40; *Byxoe v. Wood*, 24 N. Y. 607; *Austin v. Rawdon*, 44 N. Y. 63; *Greason v. Keteltas*, 17 N. Y. 491; *Emery v. Pease*, 20 N. Y. 62; *Conaughty v. Nichols*, 42 N. Y. 83; *Wright v. Hooker*, 10 N. Y. 51; *Walter v. Bennett*, 16 N. Y. 250; *Stroebe v. Pehl*, 22 Wis. 347; *Hopkins v. Gilman*, 22 Wis. 481; *Tenney v. The State Bank*, 20 Wis. 152; *Leonard v. Rogan*, 10 Wis. 540; *Samuels v. Blanchard*, 25 Wis. 329; *Vilas v. Mason*, 25 Wis. 310, 328.

² Cf. *Johns v. Northwestern Ass'n.* (1894), 87 Wis. 117, 114: "If this question of the sufficiency of the complaint arose on *demurrer*, the court would determine what cause of action the pleader intended to set out, and whether it was sufficiently set out. Supervisors of Kewaunee Co. *v.* Decker, 30 Wis. 624. On a *motion* to make the complaint definite and certain, the court will require the plaintiff to make 'the precise nature of the charge'—the cause of action—'apparent upon the face of the complaint.'" Per Newman, J.

For the function of the motion as distinguished from the demurrer, see *infra*.

³ *Howland v. Needham*, 10 Wis. 495, 498.

⁴ See *Clark v. Langworthy*, 12 Wis. 441; and *Gillett v. Treganza*, 13 Wis. 472.

This is not only in harmony with the decisions above referred to, but with all the decisions of this court bearing upon the question, and we know of none elsewhere in conflict. It is in harmony with those decisions which have been made, that an application to amend should be denied, which proposes to entirely change the cause of action sued upon, or to introduce a new one of a different kind.¹ It is in harmony with the decision in *Schuenert v. Kaehler*, 25 Wis. 523, where upon demurrer to the counter-claim of the defendant, the court inspected the complaint and determined the nature of it, and said that "the subject of the action is the tort or wrong which was committed in the conversion of the money. That is the foundation, and sole foundation of the plaintiff's claim in this form of action; for unless the money was unlawfully converted, the action cannot be maintained." Counsel criticise this language and say that it is inconsistent with some of the cases first above cited. We answer clearly not, when correctly understood and applied, that is, in case proper objection was taken to a recovery upon any other ground, or upon any proofs short of those establishing the cause of action stated in the complaint. Counsel say, however, and we think with entire correctness, that after demurrer sustained to the counter-claim, as was there done, on the ground that the complaint was in tort, there could be no recovery in the action except for a tort. The greatest injustice might result to the defendant if this were not so, or, if having been deprived of his counter-claim on the ground that the action was in tort, the plaintiff should afterwards be permitted to recover against him as upon contract.

And the same view is also in keeping with the decision of this court recently made in *Anderson v. Case*, 28 Wis., 505, where in an action *ex delicto* for the seizure and conversion of certain personal property, the plaintiffs claimed that the judgment appealed from should be affirmed by this court as one for money had and received, being the proceeds of the sale of the property by the defendants which the evidence on the trial showed had been made and the price received by them in money. But it was held against the plaintiffs, and the judgment was reversed because of the substantial difference between the action for the wrongful conversion and the action for money had and received, and because, in the former, execution goes against the body of the debtor as well as his property, while in the latter it goes only against his property. That decision is authority for the position that to justify the rendition of judgment upon proof of liability *ex contractu*, where the form of action is *ex delicto*, the proceedings must be changed by amendment so as to conform to the facts proved and the nature of the cause of action established, or otherwise that the judgment itself must distinctly specify and show that the recovery was upon contract and not in tort.

¹ *Newton v. Allis*, 12 Wis. 378; *Sweet v. Mitchell*, 15 Wis. 641, 664, and 19 Wis. 528; *Larkin v. Noonan*, 19 Wis. 82; *Stevens v. Books*, 23 Wis. 196.

And directly also in support of the same view, that the court must ascertain and decide definitely what the character of the pleading is, and the nature of the cause of action stated in it, or intended to be, is the late case of *Lee v. Simpson*, 29 Wis., 333, which likewise arose on demurrer to the complaint. And see also *Ragan v. Simpson*, 27 Wis., 355; where it was held in an action for unlawful detainer, taken by appeal to the circuit court, that the defence set up and proved that one of the defendants was a mortgagor in possession, with right to redeem, could not be treated at the instance of the plaintiffs as an action by the defendants, or one of them, to redeem from the mortgage, but that the defendants were entitled to a judgment of dismissal.

But the language in our own reports which most nearly indicates the true rule of law and practice in cases of this nature, is that Mr. Justice Paine in *Samuels v. Blanchard*,¹ where, speaking of the complaint in that case, he says: "If the question had been presented properly at the preliminary stage of the case, the character of the summons, taken in connection with the form of the allegations of the complaint, might have required it to be decided that the action must be in strictness regarded as upon contract." And again, he says: "The facts that, if the action was considered as one upon contract, the objection appeared on the face of the complaint and might have been taken advantage of by demurrer, and that no demurrer was interposed, and that both parties introduced fully their evidence, as to the whole controversy, in the absence of anything showing that this distinct question was raised at all in the court below, we think sufficiently establish the claim of the respondent's counsel, that it was tried there as an action of tort, without objection, and must be so treated here."

The foregoing language indicates, not only that the sufficiency of the pleading must be determined on demurrer to it, but also the true nature and object of it, or what the particular kind or cause of action stated is, or is designed to be, and that for this purpose the character of the summons may be taken into consideration in connection with the form of the allegations of the complaint. And this we take to be the true rule, that the court must in the first instance decide with certainty what the specific cause of action counted and relied upon is, and, having decided that, it must next determine whether the complaint contains a sufficient statement of such cause, and if it does not, the demurrer must be sustained. In the present case the summons is for relief, and not one for a money demand arising on contract. The summons is appropriate, therefore, only to the action of tort or for the wrongful conversion of the moneys. It corroborates the intention of the pleader as shown by the allegations of the complaint, to sue in that form of action, and from both, we think it clearly enough appears, that the action is and was designed to be in tort and not upon contract; and by this standard or by the rules of pleading which should govern in an

¹ 25 Wis. 329.

action for the wrongful conversion of the moneys, must the sufficiency of the averments be tested.¹

If instead of this action in tort, the defendant had been sued upon his official bond or bonds for not accounting for and paying over the same moneys, and breaches had been assigned in the same words as in this complaint of request and refusal, or demand and refusal, such assignments would have been bad on demurrer as showing no violation of the conditions of the bonds.² It would be something very remarkable in the history of pleading, should it be held that the same facts which *would not* constitute a breach of the official bond of a public officer in not accounting for and paying over public money in his hands, *would* constitute a tortious and wrongful conversion of the same moneys for which an action *ex delicto* might be maintained against him. We think no statement of facts in a case like this not sufficient to show a breach of the official bond growing out of the same transactions, will be sufficient to show a conversion of the moneys.

By the Court.

Order reversed and cause remanded.

SUPERVISORS OF KEWAUNEE COUNTY v. DECKER.

SUPREME COURT OF WISCONSIN, JANUARY TERM, 1874.

[34 Wis. 378.]

Appeal from the Circuit Court for Kewaunee County.

This case has been twice before this court on appeal, and is reported in 28 Wis., p. 669, and 30 Wis., p. 624; and a statement of the action as originally brought appears in the volume first named.

Pursuant to the order made in this court on the last appeal³ the circuit court of Kewaunee county made an order sustaining the demurrer to the complaint, and granted leave to the plaintiff to amend his complaint. Plaintiff then served an amended complaint, substantially the same as the original, except that the words "*and converted the same to his own use,*" are omitted. The defendant's attorneys at once returned the amended complaint, on the ground that the summons was one for relief; that the complaint theretofore served was in conformity with such summons, for an action in tort; and that the amended complaint proposed to change the causes of action *ex delicto* into several causes of action *ex contractu*. Afterwards the defendant moved to strike from the files of the court the amended complaint, on the same grounds; and appealed from an order denying the motion.

¹ Part of the opinion, considering particular allegations in the complaint, is omitted.

² The Board of Supervisors of Iowa County v. Vivian, Treasurer, 31 Wis. 217; Supervisors, etc., v. Kirby, 25 Wis. 498; Wolf v. Stoddard, 25 Wis. 503.

³ See 30 Wis., 624.

Felker & Weisbrod, for appellant.

J. D. Markham (with *Gillet & Taylor*, of counsel), for respondent.¹

COLE, J.—The original complaint, according to the decision of this court, stated a cause of action for the wrongful conversion of money, although it was held that the pleading was defective for not setting out the facts showing in what the fraud or wrong of the defendant consisted.² The amended complaint, it is conceded, states a cause of action on contract for money had and received. And the sole question presented is, whether a party, under the form of an amendment, can change the very gist and nature of the action from one *ex delicto* to one *ex contractu*? The counsel for the plaintiff insists that the true rule of law is, that there is no restriction upon the power of the court to allow amendments *before trial*, even though the effect of the amendment be to change the whole cause of action or grounds of defence. And he refers to a number of decisions in the state of New York, which he claims sustain this position.³ We shall not go into any examination of those cases to determine whether they sustain to the full extent the position to which they are cited, or not. It is sufficient to say that the rule has been practically settled the other way in this state in a great number of cases, and we have no disposition to throw any doubt upon the correctness of those decisions by treating the question as an open one. The cases in this court will be found in the note of the chief justice to *Brayton v. Jones*, 5 Wis., 117, Appendix, 627, where they are fully commented on and explained. It is there shown that an amendment before trial, which attempts to change the nature of the action from one in tort to one in contract, is properly not an amendment, but a substitution of a cause of action different in nature and substance from that originally stated. The power of amendment does not go to that extent, and therefore the amended complaint in the present case was unauthorized. When evidence is admitted on the trial without objection, great liberality of amendment is exercised by the court in order to conform the pleadings to the facts proven, and give the plaintiff the relief he may seem entitled to.⁴ But this stands upon different grounds, as will be seen in those cases. It is true, the amendment was merely striking out only a few words of the original complaint; but it so happens that these words give character to the action, and show it to be one in tort. And we are fully of the opinion—to use an illustration put by the counsel for the defendant—that the code never intended to allow a party to file a complaint for the conversion of a promissory note; then by amend-

¹ The arguments are omitted.

² 30 Wis. 624.

³ The decisions thus cited were, apparently, *Troy v. Boston R. R. Co.* (1855), 11 How Pr. 168, 170; *Bacon v. Comstock* (1855), 11 How. Pr. 197; *Deguerre v. Orser* (1856), 3 Abb. Pr. 86; *Harrington v. Slade* (1856), 22 Barb. 161, 164; *Chapman v. Webb* (1852), 1 Cole Rep., N. S. 388; *Andrews v. Bond* (1853), 16 Barb. 633; *Rawson v. Wetmore* (1862), 39 Barb. 104; *Bigelow v. Dunn* (1868), 53 Barb. 570; *Beardsley v. Stover* (1852), 7 How Pr. 294; *Gray v. Brown* (1857), 15 How. Pr. 555.

⁴ Citing 22 Wis., 347 476; 26 id. 540.

ment change the complaint into one for the recovery of real estate ; and that again into a bill in equity to enforce the specific performance of a contract, or one to redeem a mortgage, and so on. This is very like a *reductio ad absurdum* ; but to that length the position of plaintiff's counsel logically leads. But this question is so thoroughly treated in the note above alluded to, that any further discussion of it seems quite unnecessary.

That the order refusing to strike the amended complaint from the files is appealable, was not seriously questioned on the argument.

By the Court.—The order appealed from is reversed, and the cause is remanded for further proceedings according to law.

STERNBERGER *v.* MCGOVERN.

COURT OF APPEALS OF NEW YORK, FEBRUARY, 1874.

[56 N. Y. 12.¹]

Plaintiffs and defendant executed a written instrument by which the former agreed to sell defendant certain land on Thompson-street, New York city, for \$125,000, payable as follows: \$20,000 by defendant's assuming two mortgages to that amount on the premises; \$64,500 by a deed from defendant and his wife to a piece of land at Mott Haven, and the balance by defendant's bond secured by mortgage on the Thompson-street property. On his part, the defendant, in the same instrument, agreed to sell plaintiffs the Mott Haven property for \$82,500, payable as follows: \$18,000 by plaintiff's assumption of a mortgage thereon, for that amount, and the balance by the deed to the Thompson-street property. The instrument specified when and where the deeds were "to be exchanged," and prescribed their form and manner of execution. On the day and at the place designated, plaintiffs had ready for delivery to defendant a deed duly executed, and tendered performance of the agreement on their part. The defendant did not appear at the time and place agreed upon, and wholly failed to perform his part of the agreement, for the reason that his wife refused to join in a conveyance of the Mott Haven property, or to release her inchoate right of dower therein, although he in good faith endeavored to induce her to do so. This fact was known to plaintiffs before their action was begun.

The complaint treated the agreement as an agreement by the defendant to purchase the Thompson-street property for \$125,000, and plaintiffs' tender as passing the title to defendant. The prayer was that the property be sold and its net proceeds be paid to plaintiffs upon the amount due for the purchase money, and that they have judgment

¹ S. C. Abb. Pr., N. S. 257. See also report of case in General Term, 4 Daly, 456.

against the defendant for \$105,000 (the amount of the purchase money less the mortgages on the property), with interest, or for such other relief, &c.

The Special Term held that the plaintiffs were entitled to a specific performance; that the defendant should accept the deed tendered, and pay the consideration; and that plaintiffs had a lien on the premises for the payment thereof.

On appeal, this judgment was reversed by the General Term, which held that the agreement was not for a sale of the premises but for an exchange; that as the plaintiffs had not parted with possession, they could not maintain an action to enforce a vendor's lien for the price; that, as the defendant's inability to perform specifically was known by plaintiffs before action brought, there was no case presented for the interposition of equity; and that the complaint should have been dismissed and the plaintiffs left to bring an action at law for damages. From a judgment entered on this decision an appeal was taken to the court of appeals.

Everett P. Wheeler, for the appellants.

T. C. T. Buckley, for the respondent.¹

GROVER, J.—The different conclusions arrived at by the Special and General Terms arose from the different construction of the contract of the parties which was respectively adopted. The Special Term held that the contract of the plaintiffs to sell and convey to the defendant the Thompson-street property for \$125,000, was an independent contract not affected by that part relating to the Mott Haven property otherwise than by giving the defendant the right of paying a part of the \$125,000 by conveying the same to the two plaintiffs at the price specified. If this is the true construction, the judgment of the Special Term to the effect that the plaintiffs were entitled to a specific performance as to the Thompson-street property, irrespective of the ability of the defendant to perform that part of the contract relating to the Mott Haven property, was correct; and the only remaining question would be whether the mode of enforcing performance of this contract was proper under the facts of the case. The General Term construed the contract as entire, in substance—one for the exchange of the one property for the other, and the giving the bond and mortgage by the defendant to the plaintiffs upon the Thompson-street property, as the mode by which the estimated excess of the value of that over that of the Mott Haven property was to be adjusted. If this is the true construction it is obvious that a specific performance of the contract as to the Thompson-street property could not be enforced against the defendant, while he was unable to perform as to the Mott Haven property. In other words, the defendant having, by this construction, agreed to exchange the Mott Haven property for the Thompson-street property, and to give the plaintiff a mortgage upon the latter for its estimated excess in value

¹ The arguments are omitted.

over that of the former,—and being unable to give a good title to the Mott Haven property, or such title as the plaintiffs were willing to accept,—could not be compelled to take title to the Thompson-street property, and pay the sum in cash therefor which had been inserted in the contract as its price, but which was inserted as a mode of arriving at the difference in value of the respective properties.

I think the construction adopted by the General Term was the one that was intended by the parties: that the contract was one for an exchange;—not one binding the defendant to purchase the Thompson-street property, giving him an option to pay a large portion of the purchase money by conveying the Mott Haven property as provided by the contract, or of paying that portion in money; and binding the plaintiffs to purchase the Mott Haven property, giving them an option of paying therefor, by converting the Thompson-street property, or in cash:—in other words, not a contract binding each to purchase the property of the other, at the price named in the contract, but binding neither to sell unless he chose. The language of the contract shows that this was not the intention of the parties. By that, each of the parties expressly agree to sell and convey their respective property as specified in the contract. It is much more explicit in this respect than in the agreement to purchase, that being left to inference from the general language of the contract. To construe the contract as requiring each to purchase at the option of the other, but requiring neither to convey unless he chose to do so, would wholly defeat the intention of the parties, and yet this is the result of the construction adopted by the Special Term. By that, the defendant was held bound to take the Thompson-street property, and in case of failure to convey, as specified, the Mott Haven property, to pay the sum specified as the value of the former in cash. Under this construction, the plaintiffs, if unable to give title to the Thompson-street property, might have been compelled to take the Mott Haven and pay cash therefor. As above remarked, this would entirely defeat the intention of the parties, as appears from the language of the entire contract. That shows that the object was to exchange the one property for the other, the defendant paying the estimated excess in the value of the plaintiffs' property to them. This being so, the contract was entire, and a specific performance of a part only cannot be awarded.¹

My conclusion therefore is that upon the facts found by the Special Term, the plaintiff was not entitled to the specific performance of the contract or any part of it. The plaintiff must resort to his legal remedy for the damages, if any, that he has sustained from the defendant's breach of the contract.

The remaining question is whether the General Term ought not to have ordered a new trial instead of giving final judgment dismissing the complaint. It appears from the opinions that the latter course was

¹ Part of the opinion, discussing another point, is omitted.

adopted for the reason that it appeared upon the trial that the plaintiffs were aware, at the time of the commencement of the action, that the defendant could not perform the contract, and that in such a case equity would not retain the suit for the purpose of awarding damages which could be recovered in an action at law. This was the rule prior to the adoption of the Code.¹ But the Code authorizes the uniting in the complaint of causes of action both legal and equitable arising out of the same transaction.² The facts constituting these causes of action must be stated in the complaint. The court held in that case that no facts constituting a legal cause of action were stated in the complaint, and that as the plaintiff failed to prove the equitable cause of action stated, the complaint was properly dismissed.

This shows that where the complaint states facts giving an equitable cause of action, and also a legal cause of action arising out of the same transaction, the party is entitled to have both tried if necessary to obtain his rights. That is this case. The complaint sets out the contract, and alleges a tender of performance by the plaintiff and a breach by the defendant, and demands judgment for \$125,000 and other relief. True, he demands equitable relief based upon the ground that he was entitled to a specific performance of that part of the contract relating to the Thompson-street property. He failed in showing a right to this. He then had a right to a trial of his claim for damages sustained by the breach. True, the mode of trial may be different. The former must be tried by the court or a referee unless some question or questions of facts involved are ordered by the court to be tried by jury. Either party has the right to a jury trial of the latter. This creates no practical difficulty. The one issue may be tried by the court and the other by jury if the ends of justice require the trial of both, or both may be tried by the court or a referee if the parties so desire. The judgment of the General and Special Terms must be reversed and a new trial ordered; costs to abide event.

FOLGER and JOHNSON, JJ., concurred; ALLEN, J., concurred in the result, in view of the peculiar circumstances of the case, without, however, passing upon the question whether specific performance with money compensation for inchoate right of dower may not be awarded in cases of exchange, as well as upon a contract for the purchase, of real property; CHURCH, CH. J., and ANDREWS, J., expressed no opinion; RAPALLO, J., absent.

Judgment reversed, and a new trial ordered; costs to abide event.

¹ Citing *Morse v. Elmendorf* (1844), 11 Paige, 277.

² *Bradley v. Aldrich*, 40 N. Y., 504, 512.

PIERCE v. CAREY,

SUPREME COURT OF WISCONSIN, JANUARY TERM, 1875.

[37 Wis. 232.]

The complaint in this action alleged, in one count, that the defendant, offering to sell plaintiff a horse, warranted and fraudulently represented said horse to be kind, sound, and gentle, and not over nine years of age; that, at the time, the horse was not sound, but unsound to the knowledge of defendant, and was lame and diseased, which was well known to defendant; and that he intentionally, falsely, and fraudulently concealed said facts from the plaintiff, etc. The answer admitted the sale, and that defendant warranted the horse to be sound, kind, gentle, and not over nine years old; and denied every other allegation of the complaint.

The evidence on the trial was conflicting as to the *scienter*, but tended to show that the horse was not sound at the time of sale. The court instructed the jury that, if they found that the horse was unsound at the time of sale, and that defendant knew it, they must find for the plaintiff; but, if they found the horse was sound, or that he was at the time unsound, and defendant did not know it, they must find for defendant; and refused an instruction asked by plaintiff, that the warranty being admitted, if the proofs show the horse unsound at the time of sale, the plaintiff must recover; and also refused an instruction that, in an action for breach of warranty, or for false warranty, it is not necessary to show that the defendant knew of the unsoundness at the time of making the warranty.

Verdict for defendant, and the plaintiff appealed.

Norman S. Gibson, for appellant.

James Coleman, for respondent.

RYAN, C. J.—¹ All that goes to the administration of justice should be definite and certain. This is almost equally essential to the claim, the defence, and the judgment. When these become vague and loose, the administration of justice becomes vague and loose; with a tendency to rest, not so much on known and fixed rules of law, as on capricious judgment of the peculiarities of each case: on a dangerous and eccentric sense of justice, largely personal to the judges, varying as cases vary, rather than on abiding principles of right, controlling equally the judgment of courts and the rights of suitors. And it is time that those who administer the code should recur to its policy of plain and direct certainty, and rescue it from prostitution to duplicity and ambiguity, and all the juridical evils of loose and uncertain administration, more

¹ After quoting the paragraph of the remarks by Mr. Chief Justice Dixon in *Supervisors of Kewaunee County v. Decker*, 30 Wis. 624, 626, ante p. 120, and commenting upon them as "golden words which should ever be present in the mind of every pleader under the code."

dangerous to even and uniform justice than the worst technicalities of the most intricate system. Simplicity, not uncertainty, is the object of the code. And pleadings under it should be as certain in substance as they were before it; more certain in form, because freed from technical formality.

There is an essential distinction between simple and fraudulent warranties, which has always been recognized.¹ An action *ex contractu* is the only remedy on the former; an action *ex delicto* will lie on the latter. See 2 Chitty's Pl., 279, 679, for the common law forms of declaration in the two cases, the distinction being in the averment of a simple warranty in the one case, and of a false and fraudulent warranty in the other. This distinction of actions in tort and on contract is as essential under our present practice as it ever was.² In cases of warranty, *Williamson v. Allison*, 2 East, 446, seems to go very far in breaking down this safe distinction; but we cannot help regarding that and some kindred cases in the English courts, as loosely decided, because there was there no essential or resulting difference in recoveries in the two forms of action. But the difference may become essential and important where imprisonment for debt is abolished. And it is never safe to overlook the distinction between different forms of action, when the causes of action are materially different.

The complaint in this case appears to have followed a precedent in 1 Abbott's Forms, 384. It sets out by averring a simple warranty, and a fraudulent representation to the same effect. Such a representation, without fraud, operates as a warranty.³ And so the complaint commences with a duplicity, expressly recommended by the author. For that ingenuous pleader states that the fraudulent representation is not necessary to the action on the warranty, but suggests that it is well to insert it, as the evidence on trial may fail to prove a warranty, yet may disclose a fraudulent representation, upon which a recovery might be had, for the deceit, under his double form of complaint: pleading, in other words, an action *ex contractu* on a warranty, with a contingent action *ex delicto* on a fraudulent representation, *in gremio*. But we apprehend that this duplicity is subsequently cured in the precedent, as it certainly is in the complaint, by averment of the defendant's *scienter* in the warranty, which reconciles the warranty with the fraudulent representation, and makes both sound *ex delicto* for the deceit. The precedent avers a simple *scienter*, but the complaint here improves upon that, and avers a false and fraudulent concealment in the warranty. This is beyond question an action *ex delicto* on a fraudulent warranty and misrepresentation.

And so the parties appear to have dealt with the complaint, throughout, until they had rested their evidence on the trial. The answer

¹ Story on Sales, §§ 420, 421.

² Anderson v. Case, 28 Wis., 505.

³ Austin v. Nickerson, 21 Wis., 542.

admitted the warranty, but denied the fraud. And a large share of the evidence on both sides, admitted without objection, goes only to prove or disprove the *scienter* of the respondent, the fraud of the warranty. When the evidence had closed, the appellant appears for the first time to have had recourse to his special pleader's dilemma, and asked for instructions of his right to recover as in an action *ex contractu* on the simple warranty, without proof of fraud or deceit; and excepted to the charge of the court below that he could recover only in his action *ex delicto*, upon proof of the respondent's *scienter* of the falsehood of the warranty. The appellant made no other election of action, made no offer, and asked no leave to amend his complaint. He stood upon his complaint *ex delicto*, and asked to recover on it *ex contractu*. The charge of the learned judge of the court below followed the complaint, and we can not but hold that it was right.

Had the appellant, even then, asked leave to amend his complaint, so as turn his cause of action *ex delicto* into one *ex contractu*, he might have been entitled to have his action submitted to the jury in his own way.¹ On that question we express no opinion. But, if he had the right to amend, in such a case, he was bound to exercise it.² Had a verdict gone against the respondent on the instructions asked, it would have convicted him on the record of a fraud, when the proof might have established only a breach of contract. And that, aside from the question of his liability to arrest and imprisonment on execution, on which we express no opinion, would have been a wrong which no court of justice should sanction: such a wrong as the administration of the code, in its true spirit and significance, should render impossible.

Had the court below charged the jury as the appellant requested, and had the appellant thereupon recovered, a question would have arisen, whether his judgment could be upheld, which is not now here, and on which we indicate no opinion.³

But when a plaintiff, on trial, the question of material variance between the case made in the complaint and the case proved on the trial being raised before the issue is given to the jury, abides by his complaint, without amendment or offer to amend, he cannot be permitted to reverse a judgment against him, on the ground that the court below also abided by his complaint, and refused to instruct the jury that he might recover for an essentially different cause of action.

By the Court.

The judgment of the court below is affirmed.

¹ See *City Bank v. McClellan*, 21 Wis. 112; *Harris v. Wicks*, 28 Wis. 198; *Trowbridge v. Barrett*, 30 Wis. 661, and many other cases in this court.

² *Anderson v. Case*, 28 Wis. 505.

³ See *Newton v. Allis*, 12 Wis., 378; *Samuels v. Blanchard*, 25 Wis., 329; *Anderson v. Case*, *supra*.

LOCKWOOD v. QUACKENBUSH.

COURT OF APPEALS OF NEW YORK, DECEMBER 7, 1880.

[83 N. Y. 607.]

The summons in this action was for relief. The complaint alleged in substance that certain goods, the property of plaintiff, were by him intrusted to defendants as commission merchants, to be kept by them until instructed by plaintiff to sell; that they were instructed not to sell and to return the goods to plaintiff; that in violation of these instructions and without authority they sold the goods and converted them to their own use, and although a demand was made by plaintiff, they neglected and refused to comply therewith; and judgment was asked for the value of the goods. The case was tried upon the theory of an unwarranted and unratified disposition of the goods by defendants, and plaintiff's counsel asked the court to direct a verdict for him on the ground that the goods were sold and converted in violation of instructions; this was refused. The verdict was for the defendants. Upon the appeal, plaintiff's counsel claimed that the court should have directed a verdict for plaintiff for the amount of money in fact received by defendants on the sale of the goods as an action *ex contractu*. Held, untenable.

The court says: "The pleadings and the whole course of the trial shut out the idea of an action *ex contractu*. The very reason given by the plaintiff, when he asked the court to direct a verdict for him, was that the goods were sold and converted in violation of instructions; and it is plain that the action was begun, and was prosecuted throughout, on the theory of an unwarranted and unratified disposition, by the defendants, of the property of the plaintiff. There have been cases in which, though some of the averments of the complaint have designated a cause of action in tort, there were other averments which could be taken as alleging a cause of action on contract, and where, at the trial, the plaintiff sought, upon ample evidence to that end, to rest his right to recover upon contract and breach thereof, the appellate court has sustained the action as one on contract.¹ We know of none where, in the pleadings and in the evidence and at the trial, the plaintiff has insisted upon a cause of action *ex delicto*, he has been allowed in the appellate court to abandon that claim and have a reversal of judgment, for that he might, had he sued on contract, have perchance recovered. We must reverse for error in the court below. Where it was not error to refuse a judgment on a cause of action *ex delicto*, we cannot reverse, because if a judgment had been asked *ex contractu*, it might properly have been rendered. In such case it is sufficient to say that the plaintiff did not present that alternative to the trial court; and by omitting so

¹ Citing *Conaughty v. Nichols*, 42 N. Y. 83.

to do did not give the opportunity to the defendant of making any defence he might perhaps have, to an action based upon contract."

L. L. Bundy, for appellant.

J. H. Clute, for respondents.

FOLGER, CH. J., reads for affirmance.

All concur.¹

Judgment affirmed.

STEVENS *v.* THE MAYOR, ALDERMEN, AND COMMONALTY
OF THE CITY OF NEW YORK.

COURT OF APPEALS OF NEW YORK, MARCH, 1881.

[84 *N. Y.* 296.]

Appeal from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of defendant, entered upon the report of a referee.

This action was originally brought by Russell D. Miner; he having died during its pendency, the present plaintiff, as administratrix with the will annexed, was substituted.

The complaint alleges in substance that prior to July, 1866, plaintiff was the owner of certain premises in the city of New York; that these premises formed part of a street which had been closed, a new street, Seventy-eighth St., being opened, so that the premises were relieved from the public easement; that plaintiff was ignorant of these facts. The complaint then proceeds as follows:—

That, in May, 1866, the defendants offered for sale at public auction certain lands adjoining the said old street, and included in such sale the premises before described, and that one or more of the purchasers declined to take title, on the ground that the plaintiff, and not the defendants, was the owner of such premises; and that defendants thereupon employed an agent to obtain for them the plaintiff's title, of all which plaintiff was ignorant until May, 1869.

That in July, 1866, the defendants applied to the plaintiff for a release and conveyance of his title, and at the time of such application, fraudulently, and with intent to deceive the plaintiff, kept concealed from him the fact of the opening of Seventy-eighth street, and also the closing of the old street; and further, falsely informed the plaintiff that he had some slight claim to the said portion of said street, but that it was a mere equitable claim, and of no value, and asked him to execute a release or deed thereof. And that the plaintiff, misled, deceived, and induced by such fraudulent concealment and such false and fraudulent statements and misrepresentations, which he believed to be true, and relied upon, executed and delivered such release without any consideration. And that the defendants then and there presented and left with him \$25 for his trouble, in spite of his remonstrance that it was no trouble at all.

That at the time of executing such release, the premises were worth \$200,000.

Judgment was asked for this amount.

¹ Only so much of the opinion is given as refers to the one point.

Defendants answered denying the allegation of ownership in the plaintiff, and all the allegations of fraud and concealment. The referee found the execution and delivery of the deed by Miner, but found also that it was executed "without any false representations of any kind being made by defendants, or any of their agents, to said Miner, and without any fraud or deceit or fraudulent intent, concealment or procurement of any kind," and thereupon directed judgment dismissing the complaint. Judgment was entered accordingly.

Further facts appear in the opinion.

T. M. Tyng, for appellant. Assuming that the action is an equitable action, and that the facts and circumstances proved by the plaintiff and found by the referee at his request constitute fraud cognizable in a court of equity, plaintiff was entitled to a judgment fastening a trust upon the proceeds realized by the defendant upon the sale of the land, and requiring defendant to account for the same.

Francis Lynde Stetson, for respondent.

DANFORTH, J.—The names of actions no longer exist, but we retain in fact the action at law and the suit in equity. The pleader need not declare that his complaint is in either; it is only necessary that it should contain facts constituting a cause of action, and if these facts are such as at the common law his client would have been entitled to judgment, he will under the code obtain it. If on the other hand they establish a title to some equitable interposition or aid from the court, it will be given by judgment in the same manner as it would formerly have been granted by decree. So the complaint may be framed with a double aspect;¹ but in every case the judgment sought must be warranted by the facts stated. For as was said in *Dobson v. Pearce*, 12 N. Y. 156, "the question is, ought the plaintiff to recover," or as in *Crary v. Goodman*, 12 N. Y. 266, "whether according to the whole law of the land applicable to the case the plaintiff makes out the right which he seeks to establish?" It is only when he fails in doing this that he can be treated as one making a false clamor.

But, notwithstanding the liberality of the law which permits this construction, the plaintiff can have no relief that is not "consistent with the case made by his complaint and embraced within the issue."² He must, therefore, establish his allegations³ and if they warrant legal relief only, he cannot have equitable relief upon the evidence. He must bring his case within the allegations as well as within the proof.⁴ And notwithstanding the very learned and extended arguments advanced upon this appeal, we think the case must be decided upon the application of these rules. First, it is quite evident that the plaintiff at the

¹ *Wheelock v. Lee*, 74 N. Y. 500; *Hale v. Omaha Nat. Bank*, 49 id. 626; *Bradley v. Aldrich*, 40 id. 512; *Sternberger v. McGovern*, 56 id. 12; *Margraf v. Muir*, 57 id. 159.

² Code, § 275.

³ *Salter v. Ham*, 31 N. Y. 321; *Bradley v. Aldrich*, 40 id. 504; *Heywood v. Buffalo*, 14 id. 504.

⁴ *Bradley v. Aldrich*, 40 N. Y. 504; *Arnold v. Angell*, 62 N. Y. 508; *People's Bank v. Mitchell*, 73 N. Y. 415.

outset, and before commencing his action, conceived himself entitled to damages and nothing else. For in compliance with the statute in that respect he gave notice of his claim to the comptroller and demanded "payment of the sum of \$200,000 as damages for the fraudulent obtaining and using of the deed or release," mentioned in the complaint. This being refused and action commenced, the allegations in the complaint are to the same effect. They describe the property conveyed by the deed and, characterizing the application for it as fraudulent, declare that at that time the defendant was informed the property belonged to Miner; that he was ignorant thereof; and that the defendant fraudulently and with intent to deceive and defraud the plaintiff out of his aforesaid property fraudulently kept concealed from the plaintiff "the fact of the opening of Seventy-eighth street, and also the fact of the closing of" a certain other street (both material to his title); that at the same time it falsely informed and represented to him that he had some slight claim to the said portion of said street, but that it was a mere equitable claim and of no value; that misled, deceived, and induced by such fraudulent concealment, and such false and fraudulent statements and misrepresentations as to the said property, his interest therein and the value thereof, and believing the same to be true and relying thereon, and without consideration, he executed and delivered to the defendant the said deed or release; that his interest so conveyed was worth \$200,000, and for that sum judgment is demanded.

If these allegations were admitted to be true, or the defendant failed to answer, the plaintiff would be entitled to recover, and the only proceeding consequent on such admission would be an assessment of damages. But so far from that, the defendant answered and by denial took issue upon the averments. For the trial of the issue so formed a jury was the appropriate tribunal, and we find that it was resorted to.¹ Except by consent of both parties it must have been again sought; but such consent was given and we have now before us the proceedings upon a trial before a referee. His decision is to be treated like the verdict of a jury, and upon every issue he has found in favor of the defendant. He finds there was no fraud practiced, no fraudulent contrivance or concealment, no fraudulent intent on the part of the defendant or its agents. Besides this, actual good faith is established.

The whole assumed cause of action is, therefore, taken away.² Indeed it is shown to have had no existence. The General Term, by whom the evidence is weighed and examined, have approved the findings of the referee, and the judgment directed by him has been affirmed. These findings, having been made upon conflicting evidence or evidence altogether in favor of the defendant, are conclusive upon this court.³

¹ 5 J. & S. 171.

² *Miller v. Barber*, 66 N. Y. 558; *Arnold v. Angell*, 62 N. Y. 508; *Long v. Warren*, 68 N. Y. 426; *Thomas v. Beebe*, 25 N. Y. 244.

³ *Quincy v. White*, 63 N. Y. 370; *Leonard v. N. Y., etc., Tel. Co.*, 41 N. Y. 544, 558; *Stilwell v. Mutual Life Ins. Co.*, 72 N. Y. 385.

Nor do we find that any error was committed by the referee in refusing additional findings at the request of the plaintiff. The questions presented were either included in the findings already made, or depended upon inferences to be drawn from evidence not conclusive, and in neither case can those exceptions be sustained.¹ Notwithstanding this brief statement of our conclusion, we have been compelled, in arriving at it, to examine the entire evidence and the elaborate and interesting briefs of counsel; and in view of the appellant's position, that the case presented matters of equitable cognizance, it may be not improper to state that it seems to us far from clear that the circumstances are such as to require the strictness of the common law to be abated, or that upon pleadings, however framed, the plaintiff could recover. There was actual possession of the land by other parties and, as it now seems, equities affecting the conscience of the intestate, if they did not the title, and these circumstances may have led to that prompt and almost eager compliance with the defendant's application, which is now relied upon as the result of fraud or imbecility. But without regard to such considerations and upon the ground before stated, we think that the appeal is not sustained, and that the judgment should be affirmed.

All concur.

Judgment affirmed.

TRUSTEES OF KILBOURN LODGE v. KILBOURN AND OTHERS.

SUPREME COURT OF WISCONSIN, SEPTEMBER, 1889.

[74 Wis. 452.]

Appeal from the Superior Court of Milwaukee County.

The case is sufficiently stated in the opinion.

Samuel Howard and Eugene S. Elliott, for the appellant.

For the respondents there was a brief by *E. Mariner* and *F. M. Hoyt*, and oral argument by *Mr. Hoyt*.

TAYLOR, J.—The appellant commenced an action against the respondents and Frank M. Hoyt and Le Grand Kniffen in the superior court of Milwaukee county, and in such action filed a complaint against all the defendants, demanding equitable relief against all of them. To this complaint Frank M. Hoyt answered. Kniffen does not appear to have answered or demurred. The other defendants, the Kilbourns, Thordike, McCallum, and Vizay, demurred to the complaint, alleging as ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action as to them. Upon the hearing of this demurrer the court below sustained the demurrer, and from the order sustaining such demurrer plaintiff appeals to this court.

¹ *Andrews v. Raymond*, 58 N. Y. 676.

The ground upon which the demurrer was sustained is that, upon all the facts stated in the complaint, the plaintiff is not entitled to any equitable relief against them. Under the decisions of this court the demurrer was properly sustained, although the facts stated may be sufficient to constitute a cause of action at law against them. This court has frequently decided that a demurrer to a complaint which is clearly intended by the pleader as a complaint in equity, because it does not state facts sufficient to constitute a cause of action, will be sustained if the facts do not constitute a cause of action in equity, and such demurrer will not be overruled on the ground that such complaint states a cause of action at law.¹ The effect of these decisions is that upon such a demurrer the defendant may avail himself of the objection to the complaint that, upon the facts stated, the plaintiff has an adequate remedy at law and for that reason his complaint is bad as a complaint in equity.

Upon the hearing of the appeal in this case, the learned counsel for the appellant argued at length and with great ability the question whether the plaintiff had shown by its complaint that it had title to the real estate in question. This question, however, the learned attorney for the respondents declined to argue, and relied solely on the ground taken by them in the court below, viz., that upon the facts stated in the complaint it clearly appears that the plaintiff has an adequate remedy at law. This is, therefore, the only question we are at liberty to determine upon this appeal.

After a careful reading of the complaint, which sets forth at length the alleged title of the plaintiff, and which, for the purpose of this decision, may be admitted to show a good title in the plaintiff and a right to the possession of the real estate in question, we are constrained to agree with the court below that the plaintiff has an adequate remedy at law. The allegations of the complaint, upon the theory that the plaintiff acquired title to the real estate in question at the time stated in said complaint, show that immediately after that date, and before the plaintiff had taken any actual possession of such real estate, the defendants the Kilbourns claimed the title and the right of possession adversely to the plaintiff, and by their tenants took the actual possession of the premises, and held such possession in hostility to the claim of the plaintiff at the time of the commencement of this action. This state of facts shows clearly that an action of ejectment would be an adequate remedy for the plaintiff. In such action the title of the plaintiff would be adjudicated as well as the right of possession of the defendants. If, in such action, it should be held that the plaintiff had no title, that would end the controversy; on the other hand, if the plaintiff's title should be established, that would end the

¹ *Kewaunee Co. v. Decker*, 30 Wis. 624; *Tewksbury v. Schulenberg*, 41 Wis. 584; *Denner v. C., M. & St. P. R. Co.* 57 Wis. 218; *Pierce v. Carey*, 37 Wis. 234; *Gormely v. Gymnastic Asso.* 55 Wis. 350.

controversy, because in such action the plaintiff would recover of the tenants and their landlords, the Kilbourns, rent for the use of the premises as well as damages if any injury or waste to the premises had been committed by the defendants. There seems to us an entire absence of any sufficient reason for invoking the aid of a court of equity to settle the rights of the parties to this action. It seems very clear to us that a court of equity would have no power to compel the tenants of Kilbourn to attorn to and become the tenants of the plaintiff, against their consent. In a contest between the plaintiff and the tenants the court can only determine whether the tenants or the plaintiff has the title or right to the possession, but it cannot force the tenants of the claimant, Kilbourn, to become the tenants of the plaintiff. The complaint charges no fraud on the part of the Kilbourns or on the part of their tenants. It simply charges that the Kilbourns have no title to the premises or to the rents arising out of the same, except what is secured to them by the lease which it sets up as the plaintiff's title. The other allegations of the complaint show that the Kilbourns deny this alleged fact, and claim to have an interest in the premises hostile to the title of the plaintiff. They assert a legal title hostile to the plaintiff's title, and, being in the actual possession, the proper way to determine the rights of the parties is by an action of ejectment.

The fact that the complaint shows a cause of action in equity against the defendant Hoyt does not help the plaintiff as against the demurring defendants. Hoyt does not question the sufficiency of the complaint, and has answered the same.

By the Court.—The order of the superior court is affirmed, and the cause is remanded to the superior court of Milwaukee county for further proceedings according to law.¹

¹ In *Gullickson v. Madsen* (1894), 87 Wis. 19, 23, the court reaffirms the doctrine of this case, as "so often held that reference to a few only of the later cases is permissible," citing *Denner v. C. M. & St. P. R. R. Co.*, 57 Wis. 218; *Trustees v. Kilbourn*, 74 Wis. 452; *Avery v. Ryan*, 74 Wis. 599; *Stein v. Benedict*, 83 Wis. 603.

Note the form of the doctrine in *Graham v. The Chicago Ry. Co.* (1881), 53 Wis. 473, 481: "This court has decided that the whole complaint must be considered for the purpose of determining what cause of action is stated or intended to be stated; and, when it is ascertained what cause of action the pleader intended to set out in his complaint, the sufficiency of the facts stated to sustain such cause of action must be determined by the court, upon a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action; and the complaint must be held bad if the facts stated are insufficient to constitute the cause of action intended to be stated, notwithstanding they may be sufficient to constitute some other cause of action. (Sup'rs. of Kewaunee County *v. Decker*, 30 Wis. 624.) Under this rule, this court held, on the former appeal in this case, that, as the original complaint was in tort, and as the second amended complaint stated facts sufficient it themselves to constitute an action for a tort, they would presume that the pleader intended to go upon the tort as his ground of action, and not upon the implied assumpsit. To hold that the amended complaint was intended to be an action of tort, would be consistent with the original cause of action stated, and would be a permissible amendment. To hold otherwise would be inconsistent with the original, and not permissible."

And compare "The Theory of the Action," as developed by the Indiana decisions, note to *Bingham, Admr., v. S'age* (1890), 123 Ind. 281, *infra*.

But see *Meyer v. Garthwaite* (1896), 92 Wis. 571, 572: "The objection to the jurisdiction of a court of equity on the ground that the plaintiff has an adequate remedy at law must be

BINGHAM, ADMINISTRATOR, *v.* STAGE.

SUPREME COURT OF JUDICATURE OF INDIANA, FEBRUARY 25, 1890.

[123 *Ind.* 281.]

BERKSHIRE, J.—This is an action upon two promissory notes and to foreclose a mortgage. The complaint, in substance, is that on the 28th day of June, 1858, one William Donot executed to the decedent, Joseph Donot, the mortgage sued upon, to secure the payment of a number of promissory notes executed by the said William to the said Joseph, and among others the two notes in suit; that on the 1st day of October, 1880, the said Joseph died, still being the holder and owner of said notes and mortgage; that on the 12th day of March, 1867, the said William sold and conveyed the said real estate to the appellee, who, as a part of the purchase money, assumed and agreed to pay the said notes; that after the death of the said Joseph the appellee wrongfully obtained possession of the said notes and mortgage, and mutilated the same by tearing off the name of the payor; that said notes are still due to the estate of the decedent, and wholly unpaid.

After filing a demurrer to the complaint, which was overruled, the appellee filed an answer in three paragraphs. The first paragraph is a general denial; the second, a plea of payment; and the third may be termed a special plea of payment. It is, in substance, as follows: That on the 1st day of October, 1880, the said Joseph Donot, the payee of said notes and mortgage, died, leaving a widow, Maria Donot, and several children; that at the time of his death, he left property, real and personal, worth less than \$500, the amount allowed by law to his widow; that she paid his funeral expenses and the expense of his last sickness; that just before his death, the said decedent not being indebted to any one, gave the notes in suit to his said wife for her support; that after the death of the said Joseph, and when the first one of said notes became due, the said widow, having them and the said mortgage in her possession, asked the appellee to pay both of said notes, and he, acting in good faith, and believing that she was the owner of the same, and entitled to receive payment, paid the amount due thereon to the said widow, and she surrendered the same to the appellee, and she at the same time executed a release of said mortgage.

taken, in the first instance, by answer or demurrer on that ground, or it is waived. It can not be raised afterwards by a demurrer *ore tenus* on the trial. *Tenney v. State Bank*, 20 Wis. 152, 164; *Sherry v. Smith*, 72 Wis. 339; *Sweetser v. Silber*, 87 Wis. 102. The only question which could properly be raised by the demurrer *ore tenus* is, Does the complaint state a cause of action in equity? *Sherry v. Smith*, *supra*." Per Newman, J.

In the case last cited, it was held that if, in matters of equitable cognizance, a possible objection that the plaintiff has an adequate remedy at law is not taken by demurrer or answer, it ceases to be available and the court, in such case, "will adjudge on the merits of the action, without regard to the fact that there is also an adequate remedy at law." Per Lyon, J., in *Sherry v. Smith* (1888), 72 Wis. 339, 342.

To the third paragraph of answer the appellant filed a demurrer, which was overruled by the court, and he saved an exception. . . .

In our opinion, the third paragraph of the answer is bad. An answer, like a complaint, must proceed upon some single definite theory, which must be determined from the general character and scope of the pleading.¹

When it appears by the prayer and whole tenor of a pleading that it was formed on a definite theory, and it is insufficient on that theory, it will be held bad on demurrer, though the facts averred may be sufficient on a different theory.²

Isolated and detached allegations in a pleading which are not essential to support its main theory should be disregarded.³

"The object of pleading is to present, in a distinct and definite form, questions of fact for trial, and this object cannot be accomplished unless parties are required to state positively the facts upon which they rely, and in accordance with a distinct, definite, and controlling theory. If ambiguous pleadings are tolerated, no issue can be framed which will present in an intelligible form questions for trial, and perplexity and confusion will necessarily result."⁴ And further on in the opinion it is said: "Of course, causes of action may be stated in different paragraphs, but in such cases each paragraph must be complete in itself."⁵

It is true, as we have seen, that the said third paragraph of answer alleges that when the decedent died his estate was not worth \$500, the amount allowed to the widow, and that she had paid his funeral expenses and the expenses of his last sickness. Had these facts been pleaded in an answer, the scope and theory of which would have been that the estate of the decedent being worth less than \$500, and the widow having paid all claims to which the estate would be subject in her hands, she was entitled to the whole estate, and, therefore, entitled to the said promissory notes, and to receive payment thereof, we would have a different question before us. But we must regard the theory of the answer to be, that the notes belonged to the widow because of the fact that her husband had in his lifetime passed the ownership thereof to her by a gift *inter vivos*.

The facts relating to the gift seem to us to be the overshadowing facts pleaded in the answer, and what is alleged with reference to the amount and value of the estate, etc., we regard as isolated and detached allegations, which are not essential to the scope and theory of the answer.

We do not think that this paragraph of answer alleges such facts as constitute a gift *inter vivos*.

The facts alleged do not show a delivery of the notes by the decedent, the donor, to his wife, the donee.

¹ Citing *First Nat'l Bank, etc., v. Root*, 107 Ind. 224.

² Citing *Cottrell v. Aetna Life Ins. Co.*, 97 Ind. 311.

³ Citing *Cottrell v. Aetna Life Ins. Co.*, 97 Ind. 311.

⁴ *Western Union Tel. Co. v. Reed*, 96 Ind. 195.

⁵ See *Peters v. Guthrie*, 119 Ind. 44; *Wagner v. Winter*, 122 Ind. 57.

So far as we can ascertain from the answer there was no delivery or surrender of the possession of the notes by the donor to the donee. All that is alleged may be true, and the testator have continued in possession of the notes, and to exercise dominion over them to the day of his death. This being true, there was no valid gift. . .¹

Because of the error of the court in overruling the demurrer to the third paragraph of answer, the judgment must be reversed.²

¹ Citing *Smith v. Dorsey*, 38 Ind. 451, and *Smith v. Ferguson*, 90 Ind. 229.

² Only so much of the opinion is given as refers to the one point.

NOTE ON THE THEORY OF THE ACTION.

Common law pleading was characteristically a pleading according to the plaintiff's theory of the legal relation subsisting between himself and the defendant. It has become a favorite doctrine with the Indiana courts, and has some countenance in other courts, that in code pleading "a complaint must proceed upon some definite theory, and on that theory the plaintiff must succeed, or not succeed at all." *Mescall v. Tully* (1883), 91 Ind. 96, 99. Among other cases inculcating this form of doctrine, under more or less varying conditions, are:—*Judy v. Gilbert* (1881), 77 Ind. 96, 100: "A complainant cannot base his complaint upon one definite theory and then claim a right to relief upon another," citing *Lockwood v. Quackenbush*, 83 N. Y. 607. *Western Union Tel. Co. v. Young* (1883), 93 Ind. 118, 119: "A pleading is to be judged from its general tenor and scope and not from detached or isolated allegations. Where, as here, the controlling theory upon which the pleading proceeds, is that there is a contract absolving from liability, it must be good on that theory or it will not be good at all." *Western Union Tel. Co. v. Reed* (1884), 96 Ind. 195, 198, giving reasons for the rule and citing a number of cases. *Cottrell v. Aetna Life Ins. Co.* (1884), 97 Ind. 311, 313. *Chicago Ry. v. Bills* (1885), 104 Ind., 13, 16. *Wadkins v. Hill* (1886), 106 Ind. 543, 544: "It is settled law that a pleading must be good on the theory on which it assumes to be constructed or it will fall before a demurrer." *First National Bank v. Root* (1886), 107 Ind. 224, 228. *Sherwood, Admr. v. City of Lafayette* (1886), 109 Ind. 411, 423. *Green v. Groves* (1886), 109 Ind. 519, 522. *Palmer v. Chicago Ry.* (1887), 112 Ind. 250, 262. *Gregory, Admr. v. C. C. C. & I. Railroad* (1887), 112 Ind. 385, 387: "As was in effect said in *Louisville Railway Co. v. Bryan*, 107 Ind. 51, there is a clear distinction between cases which count upon negligence as a ground of action and those which are founded upon facts of aggressive wrong or wilfulness, and a pleading should not be tolerated which proceeds upon the idea that it may be good either for a wilful injury or as a complaint for an injury occasioned by negligence. It should proceed upon one theory or the other, and is to be judged from its general tenor and scope." *Lane v. Schlemmer* (1887), 114 Ind. 296, 298. *Stults v. Brown* (1887), 112 Ind. 370, 372. *Armacost v. Lindley* (1888), 116 Ind. 295, 297: "It has often been decided that every pleading must proceed upon some single, definite theory, and that a party must stand or fall upon the theory of his case as he presents it in his pleading. A recovery will be upheld only when the evidence and the facts found support the case made by the complaint." *Feder v. Field* (1888), 117 Ind. 386, 391: "The law is well settled that a complaint must proceed upon a definite theory, that the cause must be tried on the theory constructed by the pleadings, and such a judgment as the theory selected warrants must be rendered and no other or different one." *Hays v. Montgomery* (1888), 118 Ind. 91, 93. *Pearson v. Pearson* (1890), 125 Ind. 341, 344. *Horn v. Indianapolis Bank* (1890), 125 Ind. 381, 385. *Racer v. The State* (1891), 131 Ind. 393, 402: "It is well settled that a pleading must proceed upon some definite theory. It is clear that an intelligent issue could never be formed if there were no such rule, and hence the courts have adhered to the rule with strictness." *Jackson v. Landers* (1893), 134 Ind. 520, 534. *Copeland v. Summers* (1894), 138 Ind. 219, 226: "Every pleading must proceed upon some single, definite theory, and if bad upon the theory upon which it proceeds it cannot be sustained upon some other theory." *The Carmel Natural Gas Co. v. Small* (1897), 150 Ind. 427, 431: "It is settled law that a complaint must be good on the theory on which it proceeds or it will not be good at all, even though it states facts enough to be good on some other theory."

As to what constitutes the theory of one form of civil action, under this doctrine, see *Monnett v. Turpie* (1892), 133 Ind. 424, given in the text; and compare *Platter v. City of Seymour* (1882), 86 Ind. 323, 326; *Moorman v. Wood* (1888), 117 Ind. 144, 147; *Chicago Railway v. Burger* (1890), 124 Ind. 275, 276; *Comegys v. Emerick* (1892), 134 Ind. 148, 152; *Balue v. Taylor*

MONNETT v. TURPIE.

SUPREME COURT OF JUDICATURE OF INDIANA, NOVEMBER 3, 1892.

[133 Ind. 424.]

From the Carroll Circuit Court.

E. P. Hammond, M. F. Chilcote, W. B. Austin, for appellants.

L. Walker and W. B. McClintic, for appellees.

MILLER, J.—The action of the court, in refusing to grant the appellant a trial by jury, is the only question involved in this appeal.

The complaint consisted of three paragraphs. The first paragraph shows that on and prior to January 5, 1881, Thomas Monnett was the owner of several distinct tracts of land in Carroll and White counties, Indiana, and in Prairie county, in the State of Arkansas; that he was, and, for a long time prior thereto, had been a person of unsound mind, of which the defendants had notice; that on that day, with full knowledge that he was of unsound mind, the defendants, James H. Turpie and William Turpie, fraudulently, and without consideration, induced him to convey to them, by certain instruments of writing purporting to be warranty deeds, all of said real estate; that on the 23d day of June, 1881, the said Thomas Monnett was, on inquest duly had, declared to be a person of unsound mind, and incapable of managing his own estate, and a guardian of his person and estate was appointed; that on the 4th day of April, 1883, the guardian demanded a reconveyance of all of said lands to the said ward, at the same time tendering them, for execution, a conveyance to that effect; that they refused, and still refuse, to execute the same.

Subsequently Thomas Monnett died, and, by supplemental complaint, his heirs were substituted as plaintiffs. The prayer for relief is:

"Wherefore the plaintiff prays the court for a judgment disaffirming the said deeds to said defendants, James H. Turpie and William Turpie, and cancelling the same, and that the title to said lands, by the decree of the court, be revested in the plaintiff, freed and discharged from all claims of the said defendants, and each of them, and for such other relief as may be equitable and just."

The other paragraphs of complaint, in so far as they affect the question involved, do not differ from the first.

The appellants, after the inquest of lunacy and disaffirmance of the conveyances, had their election to pursue either one of the two courses: title revested in the grantor,² in which case, the Chancery Court having

(1893), 136 Ind. 368, 373; *American Wire Nail Co. v. Connelly* (1893), 8 Ind. App. 398, 403; *Doll v. C. C. & St. L. R. R.* (1899), 21 Ind. App. 571, 575.

See also, among cases calling for a strict theory of the action, *Jacobson v. Brooklyn Elevated Railway* (1898), 48 N. Y. Supp. 1072; *Leck v. Rudd* (1898), 53 N. Y. Supp. 208, both given in the text, *infra*.

First. To treat the conveyances as having been avoided by the disaffirmance, and, if out of possession, sue in ejectment, or to quiet title.¹

Second. Proceed in equity to have the conveyances cancelled and the title revested in the grantor,² in which case, the Chancery Court having jurisdiction of an essential part of the case, the whole is drawn into equity.³

To determine which of these courses the appellants elected to pursue is to determine their right to a trial by jury. If the complaint is an action to quiet title, as provided by our code, section 1070, the action was triable by a jury, and the court erred in refusing, upon appellant's motion, to submit the cause to a jury for trial.⁴ If, on the contrary, the action was for the cancellation of the deeds, it was one that, prior to the 18th day of June, 1852, would have fallen within the exclusive jurisdiction of a court of equity, and was triable by the court.⁵

The nature of the action must be determined from the general character and scope of the pleading, disregarding isolated and detached allegations not essential to the support of its main theory.⁶ The court will construe the pleading as proceeding upon the theory which is most apparent and most clearly outlined by the facts stated.⁷ The complaint will, if possible, be given such construction as to give full force and effect to all its material allegations, and such as will afford the pleader full relief for all injuries stated in his pleading.

We have arrived at the conclusion that the complaint must be regarded as a complaint for equitable, rather than legal, relief. The complaint is destitute of some of the allegations found in an ordinary complaint to quiet title,⁸ and contains much that is unusual and unnecessary in such actions. While the nature of the action must be determined from the substantive facts pleaded, and not from the prayer for relief,⁹ the statement of the relief demanded may be looked to, in connection with the other averments.¹⁰ The primary object of the action seems to have been the cancellation of the conveyances. The vague and uncertain relief asked for—the revesting of the title in the grantor, freed of the claims of the defendants—is insufficient to give character to the pleading.

There is, however, another element in the case which, beyond question, characterizes the action as one for equitable relief; that is the fact that the conveyance of the real estate, situate in the State of Arkansas,

¹ *Brown v. Freed*, 43 Ind. 253; *Freed v. Brown*, 55 Ind. 310; *Nichol v. Thomas*, 53 Ind. 42; *Long v. Williams*, 74 Ind. 115.

² 1 *Pomeroy's Eq.*, section 110.

³ *Towns v. Smith*, 115 Ind. 480; *Quarl v. Abbett*, 102 Ind. 233; *Lake v. Lake*, 99 Ind. 339.

⁴ *Puterbaugh v. Puterbaugh*, 30 N. E. Rep. 519; *Trittip v. Morgan*, 99 Ind. 269; *Johnson v. Taylor*, 106 Ind. 89; *Kitts v. Willson*, 106 Ind. 147.

⁵ Section 409, R. S., 1881.

⁶ *First Nat'l Bank v. Root*, 107 Ind. 224; *Cottrell v. Aetna Life Ins. Co.*, 97 Ind. 311; *Bingham, Admr., v. Stage*, 123 Ind. 281; *City of Ft. Wayne v. Hamilton*, 132 Ind. 487.

⁷ *Batman v. Snoddy*, 132 Ind. 480.

⁸ *Miller v. City of Indianapolis*, 123 Ind. 196.

⁹ *Martin v. Martin*, 118 Ind. 227.

¹⁰ *Galway v. State, ex rel.*, 93 Ind. 161.

is set forth and made a material part of the complaint. This real estate being situate in another state, wholly beyond the jurisdiction of the courts of this state to quiet the title thereto, conclusively shows that that was not the object of the suit. We could not presume that the plaintiff instituted an action upon a particular theory, when, according to that theory, a material and substantial portion of the subject matter of the action was wholly without the jurisdiction of the court, if another theory, equally sustained by the facts pleaded and relief demanded, would bring the whole subject-matter of the action within its jurisdiction.

If the action was in equity, the court having jurisdiction of the person was able, by process against the defendants *in personam*, to enforce its decrees affecting the land without, as well as within the state.¹

The appellants having elected to proceed in equity, they thereby deprived themselves of the privilege of submitting their cause to a jury for trial. We find no error in the record.² *Judgment affirmed.*

PETERSON v. STOUGHTON STATE BANK.

SUPREME COURT OF WISCONSIN, NOVEMBER, 1890.

[78 Wis. 113.]

Appeal from the Circuit Court for Dane County.

The following statement of the case was prepared by Mr. Justice Casoday :

The complaint alleges, in effect, that a short time prior to June 23, 1888, the plaintiff was indebted to the defendant upon several promissory notes and other demands to the aggregate amount of \$778.05, and that the defendant also held other notes and demands against the plaintiff for collection, amounting in the aggregate to \$669.75, making a total of \$1,447.80; that a few days prior to June 23, 1888, the plaintiff caused to be paid to the defendant on said aggregate indebtedness the sum of \$518.94, leaving a balance of \$928.86; that on the day and year last mentioned the defendant falsely claimed and represented to the plaintiff that he was still indebted on the several notes and demands so owned by the defendant, and so held by it for collection, in a sum exceeding \$1,200, with interest at the rate of ten per cent., and thereupon the defendant exacted security for said indebtedness; and that the plaintiff, without knowing the amount of such aggregate indebtedness, and

¹ Coon v. Cook, 6 Ind. 268; Dehart v. Dehart, 15 Ind. 167; Bethell v. Bethell, 92 Ind. 318; 1 Pomeroy's Eq., section 135.

² On the question as to the effect of the one form of action on the right to trial by jury see Davis v. Morris (1867) 36 N. Y. 569, and Cogswell v. New York Ry. (1887), 105 N. Y. 319, both given in the text, *infra*. Compare also Gunsaulus, Adm'r., v. Pettit, Adm'r., 46 O. S. 27, ante, p. 66.

relying upon such representations of the defendant, executed and delivered to the defendant a note and mortgage for \$1,200, which was in excess of the claims so owned and held by the defendant, in the sum of \$271.14; that the defendant thereupon, for value received, sold and transferred said note and mortgage of \$1,200 to another party, and also sold and transferred a note upon which there was still due \$148.06, and which note and said note and mortgage the plaintiff was liable to pay to the holder thereof; that the \$148.06, so outstanding against the plaintiff on such note, and said \$271.14, made \$419.20, which the plaintiff, by virtue of the mortgage, paid the defendant in excess of the indebtedness so owned and so held for collection by the defendant. Judgment is demanded for that amount, with interest at ten per cent., from June 23, 1888, with costs.

The answer admitted the paying of said \$518.94 as stated, and the giving and transfer of said note and mortgage of \$1,200, and the transfer of a note with a balance due thereon of about \$148, and claimed that, at the time of making said payment of \$518.94, the plaintiff was indebted on notes and claims owned by the defendant, and also on notes and claims held by it for collection, in an amount aggregating about \$1,900.

At the close of the trial, the jury returned a verdict in favor of the plaintiff and against the defendant for \$460.20, and from the judgment entered thereon the defendant appeals.

For the appellant there was a brief by *Bashford, O'Connor & Polleys*, and oral argument by *R. M. Bashford*.

For the respondent there was a brief signed by *Luse & Wait*, and oral argument by *L. K. Luse*.

CASSODAY, J.—Among the instructions rejected is one to the effect that the action was for money had and received, in the sum of \$419.20, with interest from June 23, 1888. The general charge, in effect, so treated the case throughout. At the beginning of the trial, the defendant's counsel asked the court for an interpretation of the complaint as to whether it was an action for money had and received, or for tort, but the court at that time declined to express such opinion. By reason of such ruling, the counsel for the defendant thereupon objected to any evidence under the complaint, which was overruled. Soon after, the learned presiding judge stated, in effect, that he supposed it was an action on contract; that, although he did not so rule, he thought it was an action for money received or security taken. At common law it was quite important that the pleadings should reveal the particular class to which the action was supposed to belong. But in this state the forms of civil actions are abolished, and the pleadings in such actions in courts of record, and the rules by which the sufficiency of the pleadings, are determined, are those prescribed by statute.¹ The statute specifically prescribes what the complaint should contain—including a plain and concise statement of the facts constituting the cause of action.² The

¹ Secs. 2600, 2644, R. S.

² Sec. 2646, R. S.

allegations of the complaint in the case at bar comply with that section, and the proofs support the allegations. Had the complaint been indefinite and uncertain, or contained repugnant allegations, the defendant would have had his remedy. We perceive no error in the ruling of the court mentioned.¹

DALTON v. VANDERVEER.

SUPREME COURT OF NEW YORK, SPECIAL TERM, MAY, 1894.

[31 *Abb. N. C.* 430.*]

GAYNOR, J.—The complaint alleges in sum and substance that the defendant owned a tract of sixty-five acres of land, and in order to secure the experience and assistance of the plaintiff in laying it out in lots and streets, and selling it off by lots at auction or private sale, entered into an agreement of co-partnership with the plaintiff, whereby the plaintiff was given a certain interest in common with the defendant in the lands and the future proceeds of sales thereof; that out of such proceeds the defendant was first to be paid the moneys expended in preparing the land for sale by lots, as aforesaid, the agreement requiring him to advance it all, and then \$3,000 an acre for the tract, after which the overplus, if any, should be divided between the parties; the plaintiff's share to be one quarter; and that after the plaintiff had so plotted and prepared the land for sale, and a large number of the lots had been actually sold, the defendant notified the plaintiff that he dissolved the partnership, and refused to go on any further with the enterprise as a joint one; and the prayer is for a judgment declaring the plaintiff to be a part owner of the land, for the appointment of a receiver to sell the land, and for an accounting and division.

The answer denies the co-partnership, and alleges that the plaintiff was only the employee of the defendant.

The proof shows that there was no co-partnership, but that the plaintiff was employed as an agent by the defendant to prepare the land for sale and sell it, as aforesaid, and that for his services he was to be paid one-quarter of the overplus, as already stated; and that, after the contract had been partly performed, a large number of sales having been made, the defendant discharged the plaintiff. The cause of action which the proof presents is, therefore, one for damages for breach of contract for services. The amount already realized from sales is easily ascertained. Past sales furnish evidence of the time and effort it would take to sell off all of the lots, and also of the price for which the lots can be sold, and it would not be difficult to otherwise prove their value; so

¹ Only so much of the opinion is given as refers to the one point.

² Same case, 29 N. Y. Supp. 342, 8 Misc. 484, 59 St. R. 254, 23 Civ. Pro. 443.

that no difficulty would be encountered in proving the damage which the plaintiff has sustained by the breach of the contract. In this state of the case, may the court go on and assess the damage in this action, or must the complaint be dismissed? The complaint states a case which is within the jurisdiction of equity, and is not an action at law, but the evidence fails to sustain the complaint, and also fails to make out any case which is within the jurisdiction of equity. This being so, must not the complaint be dismissed?

The origin of the High Court of Chancery in England was due wholly to the inability, and, to a limited extent, the unwillingness of the common law courts to entertain and give relief in every case, and thus meet all the requirements of justice. The common law courts paid such deference to forms and precedents that they became slaves to them. Their jurisdiction was thus circumscribed. They adhered to certain precise writs and rigid forms of action which were not sufficiently comprehensive to enable them to give adequate redress in some cases of injustice and wrong, or to give any redress in many others. In such cases the aggrieved person was remediless, except he could get a hearing of the king himself. Petitions by those in such case were, therefore, frequently presented to the king, asking for relief of him as a matter of grace, because it could not be got of his courts. From the fact that the king usually referred such petitions to his secretary, called his chancellor, they came, in course of time, to be presented to the chancellor directly by the suitors themselves; and thus, gradually, and at a time which history cannot enable us to precisely fix, the court of chancery came to be established. As is seen, its jurisdiction was wholly extraordinary. Relief was afforded by it only in those cases wherein the common law courts either could give no redress at all, or could not give adequate redress; and anyone coming to chancery with a case which did not need its extraordinary jurisdiction, but could be adequately dealt with in the common law courts, was dismissed for lack of jurisdiction.

Thus side by side, there existed the court of chancery and the common law courts, each with a distinct jurisdiction, the test of chancery's jurisdiction in any given case being that the suitor could either get no relief, or could not get adequate relief, in a court of common law. And, therefore, necessarily, there also grew up, not only two distinct systems of practice in these courts, but also two distinct systems of substantive jurisprudence, that in the Court of Chancery being the system which we call equity. In the formation of the government of this state these two distinctive kinds of courts and systems were given a place from the beginning, and the Court of Chancery here was clothed with the general jurisdiction and powers of the High Court of Chancery in England. Separate courts thus administered these separate systems of jurisprudence in this state until, by the constitution of 1846, the court of chancery was abolished and its jurisdiction and powers were devolved upon

the Supreme Court. From that time on the same court has administered justice under both systems; but, all the same, the two systems have necessarily preserved their identity and continued to exist. The Court of Chancery is gone, but the system of equity jurisprudence remains, and is still administered, but by the same court which also administers the common law system. There is only one court to administer both systems, but they remain distinct systems.

This much have I said because we seem sometimes to lose sight of it and think otherwise. The cause of this is, no doubt, the enactment in our first civil procedure code of 1848, and found in our present revised code of civil procedure, namely: "There is only one form of civil action. The distinctions between actions at law and suits in equity, and the form of those actions and suits, have been abolished."¹ But this enactment relates only to the two systems of practice, and has no reference to the two systems of substantive jurisprudence. They still exist side by side, but the separate systems of practice under which they were formerly administered have been abolished, and the one system of our practice statute substituted. It is in this view that our Court of Appeals has said that "the distinction between legal and equitable actions is as fundamental as that between actions *ex contractu* and *ex delicto*, and no legislative *fiat* can wipe it out."² And again, that "the names of actions no longer exist, but we retain, in fact, the action at law and the suit in equity."³ And again, that "although the distinction between actions at law and suits in equity is abolished, the distinguishing features between the two classes of remedies, legal and equitable, are as clearly marked and rigidly observed as they ever were, and this is necessary to the administration of justice in an orderly manner and the preservation of the substantial rights of suitors."⁴ In a word, the forms are all that are changed. The two distinct systems of justice still remain, though they are administered by the same court, under one system of practice.

This brings me down to saying what must be done with this action. Under our existing system, both actions at law and suits in equity being brought in the same court, they are in regular course placed upon separate calendars by the parties themselves, namely actions at law upon the calendar of causes to be tried by a jury, and equity actions upon the calendar of causes to be tried by the court without a jury. When chancery existed as a separate court, if a suitor came there with a common law action he was dismissed for lack of jurisdiction. But now, if a plaintiff place an action at law upon the equity calendar, and notice it for trial there, he may not be dismissed out of court. The court may, of its own motion, refuse to hear it and send it to the jury calendar; or, if the court be willing to hear it, the defendant may,

¹ § 3339.

² *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75, 83.

³ *Stevens v. The Mayor, etc.*, of N. Y., 84 N. Y. 304.

⁴ *Chipman v. Montgomery*, 63 N. Y. 221, 230.

nevertheless, by demanding a jury trial, have the cause sent to the jury calendar; and, if he does not so demand, he waives the right to a jury trial and confers jurisdiction upon the court to hear it without a jury; and the rule is the same whichever side has so placed it upon the calendar and noticed it.¹ The cause of action stated in the complaint in this action being wholly equitable, and in no respect constituting an action at law, the case was properly placed upon the equity calendar and noticed for trial there by the parties. For the same reason, the defendant had no right to demand a jury trial.

The case presented by the complaint was not one which entitled the plaintiff to a jury trial, and he was bound by the complaint in that respect. It cannot, therefore, be claimed that he waived a trial by jury of the cause of action presented by the evidence. Nor can it be said that, by failure to plead in his answer that the defendant had an adequate remedy by an action at law, he has waived his right to so claim now. When chancery existed as a separate court, and a suitor came there asking for equitable relief upon a statement of facts in his bill upon which he could get full, complete, and adequate relief in an action at law, the chancellor was free to so inform him and refuse to be vexed by his suit; but, in order that the defendant might so insist and have the suit dismissed on his motion, it was necessary for him to so plead in his answer, in default of which he was held to have waived that defence and submitted the cause to chancery for equitable disposition, provided that court could in the end make any such disposition of it; and such is still the rule of pleading.²

But the facts stated in the complaint made the action at bar an equitable one solely, and not of legal cognizance, and, therefore, the defendant could not properly have pleaded that the plaintiff had an adequate remedy in an action at law. He was not required to plead that upon the actual facts which the plaintiff had not pleaded the plaintiff could get adequate redress in an action at law. He was only required to plead to the complaint; and the complaint being framed solely for equitable relief, it being found upon trial that the plaintiff is not entitled to such a relief, the court cannot entertain the action to give judgment for damages, or to amend the complaint so as to change the action into one at law.³

The complaint is, therefore, dismissed, with costs.

¹ Code Civ. Pro., § 1009.

² *Grandin v. LeRoy*, 2 Paige, 509; *Wiswall v. Hall*, 3 Id. 313; *LeRoy v. Platt*, 4 Id. 77; *Truscott v. King*, 6 N. Y. 147; *Town of Mentz v. Cook*, 108 Id. 504; *Ostrander v. Weber*, 114 Id. 95; *Watts v. Adler*, 130 Id. 646.

³ *Wheelock v. Lee*, 74 N. Y. 495; *Oakville Co. v. The Double-pointed Tack Co.*, 105 Id. 658; *Bockes v. Lansing*, 74 Id. 437.

DEVLIN v. MAYOR, ETC., OF CITY OF NEW YORK ET AL.
COMMON PLEAS OF NEW YORK CITY AND COUNTY, GENERAL TERM,
JUNE 5, 1893.

[23 *N. Y. Supp.* 888. ¹]

Action by John B. Devlin, as administrator of Charles Devlin, deceased, against the mayor, aldermen, and commonalty of the city of New York; and Thomas Hope individually, and as administrator of A. S. Hope, deceased; Samuel Donaldson; Martin Thatcher, as trustee of Tilly R. Pratt, deceased; and Charles F. Blish, as administrator of Charles D. Blish, deceased,—to recover for work performed under a contract with the city for cleaning the streets thereof, and for a breach of such contract by the city. From a judgment for plaintiff, entered upon the report of a referee, the defendant the mayor, etc., of the city of New York, appeals.

Argued before BROOKSTAVEN, BISCHOFF, and PRYOR, JJ.

William H. Clark, Francis Lynde Stetson and Franklin Bartlett, of counsel, for appellant..

Joseph J. Marrin, T. C. Cronin, and E. T. Schenck, for respondents.

BISCHOFF, J.—Pursuant to a resolution adopted by the common council and approved by the mayor on the 11th day of February, 1861, the corporation of the city of New York, on the 26th day of February, 1861, entered into a contract in writing with Andrew J. Hackley by the terms of which he undertook to clean and keep clean "all the paved streets, avenues, lanes, alleys, and all gutters, wharves, piers, and heads of slips in the city of New York," as therein particularly provided, for a period of five years from the day of the date of the contract; and the corporation agreed to pay him for such services an annual sum of \$279,000 in semimonthly installments. The contract also expressly permitted Hackley to dispose of "all ashes, garbage, rubbish, and sweepings of every kind" for his own benefit. Immediately after it was awarded and entered into, Hackley conveyed a quarter interest in the contract each to Lewis Davis, Anthony S. Hope, and Thomas Hope, and on the 16th day of May, 1863, when further performance of the work was prevented by the municipal authorities, Hackley's entire original interest had by mesne assignments been transferred, one-eighth to Charles Devlin, one-half to Samuel Donaldson, one-quarter to Charles D. Blish, and one-eighth to Tilly R. Pratt.

Hackley and his assignees at once entered upon the performance of the work, and so continued until the 16th day of May, 1863, when, as before stated, the officers of the municipal government refused to permit them to proceed, and assumed control of the street cleaning, assigning as the ground for so doing that Hackley and his assignees had failed to

carry out the contract on their part. At that time there remained due and unpaid from the corporation five semi-monthly installments of \$11,625 each, which had become payable by the terms of the contract; and a further sum of \$2,345, the proportion for three days, had accrued for the installment next to become payable, amounting in the aggregate to the sum of \$60,450. After an ineffectual attempt on the part of Devlin, Donaldson, and Blish to induce the proper municipal officers to adjust their respective claims for moneys earned under the contract, and for damages resulting from the corporation's alleged breach of it, Devlin, in January, 1864, instituted this action to recover his share of both demands. As codefendants with the corporation he named Anthony S. Hope, Thomas Hope, Samuel Donaldson, Charles D. Blish, and Tilly R. Pratt, asserting in his complaint that they severally claimed to be entitled to some portion of the moneys due and the damages recoverable under the Hackley contract from the defendant the mayor, etc. A former trial resulted in a judgment for the plaintiff upon both demands urged against the corporation, but on appeal the court of appeals reversed it on the particular ground that the recovery erroneously included as an element of the damages resulting from the breach of the contract benefits which would have accrued to Hackley or his assignees from subcontracts had they been permitted to proceed with their performance of the work. The authority of the mayor and common council to enter into the contract with Hackley, the assignability of the latter's interests, the right to enforce these interests by his assignees, and the plaintiff's right to recover in this action for moneys earned under the contract, as well as for damages resulting from its breach by the corporation, were, however, sustained.¹ On the second trial any justification of the corporation's rescission of the contract because of Hackley's or his assignees' nonperformance or negligent performance was substantially abandoned. The plaintiff again recovered to the extent of his interest therein both for moneys earned and damages, and a like recovery was awarded against the defendant the mayor, etc., in favor of each of its codefendants.

It is now urged on behalf of the defendant (appellant) the mayor, etc., that this action is for common-law relief only; that plaintiff's rights as assignee of part of the several demands made against it under the Hackley contract are of equitable cognizance, enforceable only by an action in equity; and hence that plaintiff was not, nor is his administrator, entitled to maintain this action. We do not differ from the view taken by the general term of this court on a former appeal, and concur that the only relief sought by plaintiff against the defendant the mayor, etc., at the inception of the action was for the enforcement of common-law demands,² and are nevertheless of the opinion that the action was properly brought. That a part owner of one entire demand may recover his share from the debtor in *assumpsit* was ruled in *Risley*

¹ *Devlin v. Mayor, etc.*, 63 N. Y. 8.

² *Devlin v. Mayor, etc.*, 54 How. Pr. 50-58.

v. Bank, 83 N. Y. 318. Under our system of remedial justice introduced by the adoption of the Code of Procedure, both legal and equitable relief may be administered in the same action. It matters not that the complaint prays judgment for common-law relief only. If the court has acquired jurisdiction of all the parties necessary to a complete determination of the controversy, and the facts alleged and proved entitled the plaintiff to particular relief, that relief must be accorded him irrespective of whether or not it is denominated legal or equitable. The right of recovery no longer depends upon any distinction in the form of procedure, but upon the facts averred and proved. The code has swept away all ancient distinction between "legal" and "equitable" actions, and has substituted therefor one form of action—a "civil action." "In a purely legal action, or, to speak more correctly, in an action where the plaintiff sets forth and mainly relies upon a legal primary right or title, and asks a remedy which is purely legal, he may still invoke the aid of an equitable right or title which he holds, or of which he may avail himself, in order to maintain his contention, and obtain the legal relief which he seeks. This is a more indirect union of legal and equitable rights and causes of action than exists in any of the instances heretofore discussed; but it is none the less a union."¹ To the same effect is *Stevens v. Mayor*, etc., 84 N. Y. 296. Here the complaint sets forth every fact essential for the predication of the claims for moneys earned under the contract and for damages resulting from its breach by defendant the mayor, etc. It likewise avers that the plaintiff and the defendants other than the mayor, etc., are entitled to the whole of such claims in the proportion of their several interests therein as the assignees of Hackley. If these allegations are sustained by the proof, what does it matter that plaintiff's rights are "equitable," not "legal"? He would in either case be entitled to recovery, and the court would be enabled to proceed to a complete determination of the controversy.²

• THE TIFFIN GLASS COMPANY v. STOEHR.

SUPREME COURT OF OHIO, FEBRUARY 25, 1896.

[54 O. S. 157.]

Error to the Circuit Court of Seneca County.

Noble, Keppel, & Noble, for plaintiff in error.

Seney & Saylor, for defendant in error.³

MINSHALL, J.—The action below was brought by Daniel H. Stoehr against the Tiffin Glass Company for the amount due him upon a con-

¹ Pom. Rem. & Rem. Rights, (2d Ed.) § 85, p. 105.

² Part of the opinion, dealing with other questions, is omitted.

³ The arguments are omitted.

tract of service. By the contract the company had employed the plaintiff as a traveling salesman in its business at the rate of \$150 per month from July 1, 1890, to January 1, 1892, and his expenses. The plaintiff entered upon his employment and continued to serve the defendant until December 26, 1890, when the company, being in embarrassed circumstances and having no further use for his services, discharged him. On March 5, 1891, he commenced suit for the amount, \$486.74, then due him, March 1—being the difference between his salary and expenses at that time and the amount that had been paid him. After the expiration of his term of service, on January 15, 1892, he filed a supplemental petition, in which he averred that after diligent efforts to obtain employment he had been able to earn but \$875.72, that in his efforts to obtain employment he had expended \$134.92, and so that, allowing a credit for what he had earned, there was due him the additional sum of \$759.18, with interest, for which, with the original sum claimed, he asked judgment. The defendant answered. The making of the agreement was admitted; but issue was taken upon many of the other averments; and, as a separate defence, it was averred that on February 1, 1891, the Glass Company was, by order of the court of common pleas of Seneca county, in a proceeding duly instituted, declared dissolved, and that it thereafter had no legal existence or power to do business or to accept or pay for the services of the plaintiff. The case was tried to the court, which found the averments of the petition and supplemental petition to be true; and, whilst it did not allow the plaintiff for the expenses incurred by him in his efforts to obtain employment, rendered judgment in his favor for the amount due according to the agreement, less the amount paid him and what he had earned, making \$1,187.32.

A motion for a new trial was made and overruled, and, on error, the judgment was affirmed by the circuit court. Two errors are relied on: (1) That the plaintiff mistook his remedy, and (2) That by the dissolution of corporation, it ceased to exist, and was no longer liable on its contract of employment with the plaintiff.

1. As to the first objection that the plaintiff mistook his remedy; this is based, we think, on a misapprehension of the character of the plaintiff's petition. It is claimed to be an action to recover the wages due the plaintiff on the contract, whereas it should have been to recover damages for the breach of it. We agree with the counsel that, on the facts as pleaded, the plaintiff could not, properly speaking, recover for wages on the contract, and that his right of recovery was damages for the breach of it. But the facts pleaded, the making of the contract, his discharge, efforts to obtain employment, and the allowance of what he obtained thereby, entitled him to recover as damages the difference between what he earned and what he would have received, had he not been wrongfully discharged.¹ And under the liberal principles of our

¹James v. Allen County, 44 O. S. 226.

code, it can make no difference what he termed the number of dollars he conceived himself entitled to recover, provided that on the facts stated, he was entitled to recover something. The judgment rendered was in fact for damages and not for wages; it was for what the plaintiff lost by the breach of the contract by the defendant. The plaintiff did not mistake his remedy. He had but one, the civil action of the code. This simply required a statement of the facts on which he conceived himself entitled to a recovery of money from the defendant. The petition conformed to this requirement, and stated a cause of action. A prayer for relief is no part of a cause of action. It is the legal consequences which the plaintiff conceives the law attaches to his statement of facts; and if as a matter of law, he is right, his petition states a cause of action.¹

Judgment affirmed.

McCLURE v. LA PLATA COUNTY.

SUPREME COURT OF COLORADO, SEPTEMBER, 1896.

[23 *Colo.* 130.]

CAMPBELL, J.—In 1887 John Reid was elected county treasurer of La Plata county. During his term of office he collected taxes belonging to the county, some of which were not accounted for by him, or turned over to the county in his behalf. In 1890 he died intestate, leaving property which came into the hands of the administrators of his estate, who were appointed and qualified as such in March of that year.

This action was instituted by the board of county commissioners in January, 1892, against the administrators, to recover the amount of taxes belonging to the county not turned over to it; and additional relief was prayed that the judgment for the sum found to be due should be made a preferred claim against the property that had come into the hands of the administrators, upon the ground that it was, in part at least, the proceeds of the trust funds of the county.²

The first error assigned and argued is that this action was instituted to establish a trust and to follow the trust funds belonging to the county into the hands of the administrators, and to compel them to apply such funds to the satisfaction of plaintiff's judgment, before satisfying any other claims against the estate. Failing in this, it is said that the court lost jurisdiction to proceed further, and to do so would change the character of the action from one in equity into an ordinary action at law for the recovery of a money judgment.

¹ Only so much of the opinion is given as refers to this one point.

² Part of the opinion is omitted.

This, however, is a misconception of the character of the action, as well as an error as to the scope and effect of our code procedure. If the facts set forth in the complaint are established by the evidence, any relief to which the plaintiff is entitled should be given by the court, regardless of the prayer for relief. Before the court, in any event, could establish a lien it was necessary that a money judgment should be rendered. The mere fact that the evidence does not warrant the court in following the trust fund and impressing upon it a lien does not preclude it from rendering a judgment against the defendants for such sum as it may find to be due.¹ *Affirmed.*

BRUCE v. FOLEY.

SUPREME COURT OF WASHINGTON, NOVEMBER 4, 1897.

[18 Wash. 96.]

Appeal from Superior Court, Pierce County.

Johnson Nickeus, for appellant.

Judson Applegate and *F. G. Merrill*, for respondent.

GORDON, J.—At the trial, the defendant introduced the record of a former action between the same parties involving, we think, the identical subject matter. The record so introduced consisted of the complaint, answer, reply, and judgment in such former action, coupled with parol proof of the identity of the parties, etc. Appellant contends that the record so introduced constituted an estoppel and bar to the maintenance of the second action, and that the verdict found against her in view of such record was contrary to the evidence and should have been set aside.

Respondent further² contends that the judgment in the former suit constitutes no bar, for the reason that it was a suit in equity, whereas this is an action at law.

We have in this state (as in most code states) but one form of action for the enforcement or protection of private rights and the redress of private wrongs, and that is known as a civil action.³ Under similar provisions in New York the Court of Appeals of that state say:—"As the courts of the state are now constituted, they apply legal and equitable rules and maxims indiscriminately in every case. . . . and now when an action is prosecuted we inquire whether, taking into consideration all the *principles of law* and *equity* bearing upon the case, the plaintiff ought to recover."⁴

It is conceded by counsel that the issues in the former action were

¹ Citing *Kayser v. Maugham*, 8 Colo. 232; *Nevin v. Lulu & White S. M. Co.*, 10 Colo. 357.

² Part of the statement of the case is omitted.

³ Hill's Code, § 109 (Bal. Code, § 4783).

⁴ *New York Central Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85.

tried out and judgment was given for the defendant upon the merits. Such being the case, when the record of the former proceeding was received in evidence without objection thereto, and the identity of the causes of action and the parties established, it constituted in law a complete bar to a recovery in the present action, and the verdict and judgment should have been for the appellant. It was therefore error for the court to refuse to set aside the verdict, and for that reason the judgment must be reversed and the cause remanded.

SCOTT, C. J., and ANDERS, REAVIS, and DUNBAR, JJ., concur.¹

GARTNER v. CORWINE.

SUPREME COURT OF OHIO, DECEMBER 14, 1897.

[57 O. S. 246.]

Error to the Circuit Court of Ross County.

The case is sufficiently stated in the opinion.

Frank P. Hinton, for plaintiff in error.

C. B. Foster and *W. E. Evans*, for defendant in error.²

WILLIAMS, J.—Suit was brought by Corwine against Gartner to recover damages for breach of warranty in the sale of a horse. The petition alleges, in addition to the warranty and its breach, that the defendant knew, at the time of the sale, that the animal was not what it was warranted to be. On the trial of the issues joined by a denial of the warranty and its breach, and of the defendant's knowledge that the warranty was false, the jury was instructed, in substance, that to entitle the plaintiff to a verdict in the case, it was necessary for him to prove, by a preponderance of the evidence, that the defendant knew the warranty was false in some material particular, or had reason to believe it to be false. The judgment rendered on the verdict, which was for the defendant, was reversed for error in giving the foregoing instruction; and, upon the question concerning which the courts below entertained different opinions, the case has been ordered to be reported.

The contention of counsel for the plaintiff in error appears to be, that the effect of the averment charging the defendant with knowledge of the falsity of the warranty, was to make the action one for deceit or fraud; and, therefore, proof of such knowledge was essential to the plaintiff's right of recovery; otherwise, the petition would include two inconsistent causes of action which could not be joined.

The code permits a plaintiff to state the facts which constitute his cause of action; and when, upon any of the facts so stated, he is enti-

¹ Only so much of the opinion is given as refers to the one point.

² The arguments are omitted.

tled to recover, he cannot be denied that right because he has alleged other facts that he is unable to prove. A warranty in a sale of chattel property is a part of the contract; and the warrantor is bound by it, and answerable in damages for its breach, though he may have honestly believed the article to be as warranted. But the representations of the seller may fall short of an express warranty, and yet may be such as induce the purchaser to rely upon them, and entitle him to redress against the seller if the latter knew they were false, or recklessly made them without reasonable ground for believing them to be true. And which of these phases of his case the purchaser may be able to sustain by proof, can only be determined on the trial. But proof of either entitles him to relief.

And it is competent, we think, for a plaintiff to state in his pleading all the facts of the transaction which enter into his right to recover, as he believes them to be, though they present different grounds of recovery, and admit of different modes or measures of relief; and he may ultimately have that relief to which the allegations proved, show him entitled.

The petition of the plaintiff alleges an express warranty of the horse, and a breach of that warranty; and, his right to recover the damages resulting from that breach was not affected by the allegation of the defendant's knowledge of the falsity of the warranty. The latter allegation did not, as counsel for the plaintiff in error contends, change the action to one exclusively for deceit, nor is it inconsistent with those upon the warranty; they may all be true. Whether there is more than one cause of action stated in the petition, is a question upon which differences of opinion may exist. But it need not now be determined. If there are two, one for breach of the warranty, and the other for fraud, they grew out of the same transaction, and may be properly joined in the same petition; and no motion having been made to require them to be separately stated, that objection to the petition, if it were open to it, was waived by answer. In favor of the view that there is but one cause of action stated, it may be said, there was but a single transaction between the parties—the negotiations resulting in the sale of the horse; there was but one wrong of the defendant—the sale of an unsound animal as and for a sound one; and there is but one right of the plaintiff growing out of the wrong, and that is, to have redress for the injury he sustained in consequence of it, and for which he can have but one recovery. And a statement of all the facts of the transaction, with a demand for the relief desired, as one cause of action, seems more in harmony with our reformed system of pleading than a repetition of them, which becomes necessary, in part at least, in their statement as separate causes of action. But in either event, whether the petition contains but one cause of action or two, the plaintiff, upon proof of the warranty and that it was broken to his damage, was entitled to a verdict, notwithstanding he failed to establish by proof the defendant's knowledge that

the warranty was false; and as this right was denied him by the instruction given to the jury, the reversal of the judgment for that reason was not error.

Judgment affirmed.

MENTZER v. THE WESTERN UNION TELEGRAPH COMPANY.

SUPREME COURT OF IOWA, FEBRUARY 9, 1895.

[93 Iowa 752.]

This is an action at law to recover damages from defendant for negligently failing to deliver a telegram notifying plaintiff of the death of his mother, in the state of Ohio, whereby he was prevented from attending her funeral. There was a trial to a jury, verdict and judgment for plaintiff for the sum of one hundred dollars, and defendant appeals.

Mills & Keeler, for appellant.

Heins & Heins, for appellee.

DEEMER, J.—There was testimony tending to show, and the jury may well have found, that on the eleventh day of April, 1892, one H. Dorn delivered to the defendant, at Creston, Ohio, to be transmitted to plaintiff, at Cedar Rapids, Iowa, the following telegraphic message: "Creston, Ohio, 11, 1892. To J. D. Mentzer, Cedar Rapids, Iowa. Mother dead. Funeral Wednesday. Answer if coming or not. H. Dorn." That Dorn paid the regular charges for transmitting the same, and, at the time of the delivery of the message, informed defendant's employe in charge of the office at Creston that it was plaintiff's mother who was dead. That the message reached defendant's office at Cedar Rapids at 9:16 A. M., April 11, 1892, but through the negligence and carelessness of defendant's employes, was not delivered until 9 P. M., April thirteenth. The plaintiff inquired at defendant's office at Cedar Rapids at about seven o'clock in the evening of April eleventh, and was informed there was nothing there for him. It is shown beyond dispute that plaintiff's mother died at Creston, Ohio, on April 11, 1892, and was buried on the thirteenth, and that, by reason of the failure of defendant to deliver the message informing plaintiff of her death, he was prevented from attending her funeral. There was also testimony tending to show that plaintiff lost some time from his work, in trying to discover whether a message had been sent him or not. The court gave the jury the following instruction with reference to the measure of damages, in the event they found plaintiff entitled to recover: "(7) If you find for plaintiff, then you will allow him for the amounts he paid for messages sent by him, if any; for loss of time caused by the failure to deliver said message, and rendered useless thereby, if any; and, in addition thereto, such an amount as you may find from the evi-

dence to be just and reasonable to compensate plaintiff for the damages sustained by reason of mental anguish suffered by him by reason of failure to deliver said message, if any. But you should not allow plaintiff anything for loss of time or expense in going to Creston, Ohio, nor should you allow plaintiff for the money paid by Dorn for the message in question."

It is conceded by appellant's counsel that plaintiff suffered damages under the first two heads covered by the instruction, to the amount of one dollar, and no complaint is made of the charge, so far as it relates to these two items. The objection to the instruction is that it allows the jury to assess damages for "mental anguish," and it is contended that such damages are not allowable in actions of this kind. Counsel also insists that, if such damages are recoverable in any case, they should not be allowed here, for the reason that the testimony negatives any such suffering on the part of the plaintiff as would entitle him to recover. Disposing of this last proposition first, we have to say that there is sufficient testimony on the record to justify the conclusion that the plaintiff did suffer as claimed. The evidence discloses such conduct on the part of plaintiff in inquiring for a message at the office of the defendant company, and in the efforts put forth by him to ascertain if a death message had come, as to evince mental anxiety. Plaintiff says he was desirous of attending his mother's funeral, and that he felt "hard" because of the delay in the delivery of the message. He immediately telegraphed to ascertain if he could be present at the funeral, and took up his journey to Ohio, to be in attendance upon the burial. When he called at defendant's office, after the receipt of the message, he was excited and anxious. He complained of the delay, and wanted to know why the message was not delivered at his house. We think these declarations, and this course of conduct, clearly indicate that plaintiff did suffer as charged. We have, then, the question as to whether damages for mental suffering can be recovered in actions of this kind, independent of any physical injury, where the company is advised of the character of the message, and negligently fails to deliver it. This question has been variously decided by the different courts of the country, but, up to this time, is an open one in this state.¹

The general rule which has come down to us from England, no doubt, is that mental anguish and suffering resulting from mere negligence, unaccompanied with injuries to the person, cannot be made the basis of an action for damages.²

And doubtless this is the rule of law to-day in all ordinary actions, either *ex contractu* or *ex delicto*. But it must be remembered that there are exceptions to the rule, and that the telegraph, as a means of conveying intelligence, is comparatively a new invention. The general rule above referred to was adopted long before the electric current was har-

Part of the opinion, citing cases on this question of substantive law, is omitted.
See *Lynch v. Knight*, 2 H. L. Cas. 577; *Hobbs v. Railroad Co.*, L. R. 10 Q. B. 122.

nessed and made subservient to the will of man. One of the crowning glories of the common law has been its elasticity, and its adaptability to new conditions and new states of fact. It has grown with civilization, and kept pace with the march of events, so that it is as virile to-day, in our advanced state of civilization, as it was when the race was emerging from the dark ages of the past. Should it ever fail to be adjustable to the new conditions which age and experience bring, then its usefulness is over, and a new social compact must be entered into.

Let us look at this query, then, upon principle and see if such damages are recoverable. And first we must determine the nature, object, and purposes of telegraph companies; their legal status and duties to the public, and to those with whom they do business; then the nature of the action; and, finally, the elements of damage which may be recovered, either by reason of their breach of contract or because of their failure to perform their duties,—and see if there is any reason known to and recognized by the law, why such damages should not be allowed. Far be it from our purpose to make law. We cannot legislate, but will discover, if we can, whether there are any precedents for recovery lying in the ashes of the past.

What, then, is the nature, purpose, and object of the telegraph, and what is its legal status? It is a system of appliances conducting the electric current or fluid, used for the purpose of transmitting intelligence, thought, or news from one place to another. Somewhat akin is it to a common carrier, in this: that they are both carriers, and must serve all alike; but the carrier transports persons or goods, while the telegraph conveys intelligence. The very object of the invention is to quickly convey information from one to another, upon which that other may act. It is a public use, and for that reason eminent domain may be exercised in its behalf, and is engaged in a business affecting public interests to such an extent that the state may regulate the charges of the companies engaged in the business. It is not an insurer of the accuracy or of the delivery of messages intrusted to it, but it is so far a common carrier as to be bound to serve all people alike, and to exercise due care in the discharge of its public duties. Nor can it provide by contract for exemption from liability from the consequences of its own negligence. Enough has been stated to show that it owes a duty to all whom it attempts to serve, independent of the contractual one entered into when it receives its messages. Telegraph companies are held, then, to the exercise of due care, and for negligence, either in sending or delivering messages, are liable to any person injured thereby for all the damages he may sustain. We have stated these rules in order to show that one who is injured by their neglect of duty may maintain an action, either *ex contractu* or *ex delicto*, for the injuries sustained. The rule, no doubt, is as announced by Judge Cooley in his work on Torts, at page 104 et seq.: "In many cases an action, as for tort, or an action for a breach of contract, may be brought by the same party on the same

state of facts. This, at first, may seem in contradiction to the definition of a tort as a wrong unconnected with a contract, but the principles which sustain such actions will enable us to solve the seeming difficulty. . . . There are also, in certain relations, duties imposed by law, a failure to perform which is regarded as a tort, though the relations themselves may be formed by contract covering the same ground. . . . Thus, for breach of the general duty imposed by law because of the relation, one form of action may be brought, and for the breach of contract another form of action may be brought."¹

In this state all forms of action are abolished. The pleader simply makes a plain statement of the facts, avoiding legal conclusions, and may recover as damages, on the facts stated, whatever the law will allow, either for breach of contract or for the tort pleaded. We desire to make this plain, for if, in the further progress of the opinion, it should appear that damages for mental suffering are allowed in cases of this kind, either for breach of contract or for tort, then plaintiff may recover. With this thought in mind, the reader may also be able to explain and reconcile some of the cases before cited. . . .

In the case of *Stevenson v. Belknap*, 6 Iowa, 103, which was an action brought by a father for the seduction of his daughter, this court approved an instruction that damage may be given, not only for his loss of service and actual expenses, but also on account of the wounded feelings of the plaintiff, and of his anxiety, as a parent of other children, whose morals may be corrupted by the example. In the case of *McKinley v. Railroad Co.*, 44 Iowa, 314, which was an action for an assault by one of the defendant's employes upon the plaintiff, the lower court instructed the jury that the plaintiff might recover, as compensatory damages, not only for bodily pain and suffering, but for the outrage and indignity put upon him. This instruction was approved, and it was held that mental suffering not arising from bodily pain, but from the nature of the assault, might be recovered, the court using this language: "The question is fairly presented whether mental anguish, arising from the nature and character of the assault, constitutes an element of compensatory damages. . . . We, on principle, are unable to see why mental pain arising from or caused by the nature of the assault whereby the wound was inflicted . . . should not be an element of such damages." "A careful examination of the authorities will disclose the fact that the weight of adjudicated cases is in favor of the proposition that mental anguish arising from the nature and character of the assault is an element of compensatory damages. . . . The mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter." It may also be said in this connection that the court in this case decline to follow the case of *Johnson v. Wells, Fargo & Co.*, 6 Nev.

¹ See also, *Rich v. Railroad Co.*, 87 N. Y. 382; *Nevin v. Pullman Car Co.*, 106 Ill. 222; *Railway Co. v. Kemp*, 61 Md. 619; *Cooley, Torts*, p. 3.

224, and kindred cases, which are relied upon by appellant's counsel, remarking that "the decided weight of authority is opposed to the view taken in that case, and we are unwilling to follow it, and by so doing ignore the other authorities cited." That the question was well considered and deliberately decided is apparent from the fact that Mr. Justice Day dissented from the conclusion of the majority. In the quite recent case of *Shepard v. Railway Co.*, 77 Iowa, 58, 41 N. W. Rep. 564, we went still further, and squarely held that damages for mental suffering are recoverable, although there was no physical pain or injury. In that case we said: "If these things (wounded feelings) may be considered in connection with physical suffering, in estimating actual damages, we know no reason which forbids their being considered in the absence of physical suffering. It is said that the 'mental pain' contemplated by the court in the case last cited (44 Iowa, 314) includes something more than mere wounded feelings or wounded pride, and that the latter can be considered only where malice is alleged and proven, and where there has been proof of actual bodily injury. We do not think the claim is well founded. Humiliation, wounded pride, and the like may cause very acute mental anguish. The suffering caused would undoubtedly be different in different persons, and no exact rule for measuring it can be given. In ascertaining it, much must necessarily be left to the discretion of the jury, as enlightened by the charge of the court. The charge given in this case, as a whole, confined the jury to an allowance for compensatory damages." In the case of *Curtis v. Railway Co.*, 87 Iowa, 622, 54 N. W. Rep. 339, this court squarely held that damages might be recovered for mental pain and suffering, although the damages for physical injury were merely nominal; and further held that such damages were compensatory, and not punitive. In the case of *Parkhurst v. Masteller*, 57 Iowa, 480, 10 N. W. Rep. 864, which was an action for malicious prosecution, this court followed the *McKinley* case, and held that in such actions actual damages would include compensation for bodily and mental suffering, and clearly held that damages for mental suffering might be recovered in such cases although entirely disconnected from bodily suffering or disability. In a case of assault and battery,¹ this court held that damages for mental anguish might be allowed as compensation. In the case of *Paine v. Railway Co.*, 45 Iowa, 569, the rule in the *McKinley* case was recognized; but it was held there was no right of recovery for injury to feelings, on account of the peculiar facts of that case. And the case of *Fitzgerald v. Railway Company*, 50 Iowa, 79, merely follows the *Paine* case, and holds that, under the facts, plaintiff was not entitled to recover. The rule of the *McKinley* case has never, to our knowledge, been doubted by any later decision. In the case of *Stone v. Railroad Company*, 47 Iowa, 88, it was held that the action in that case, owing to its peculiar facts, was an action for breach of con-

¹ *Lucas v. Flinn*, 35 Iowa, 9.

tract; and that damages for mental suffering were not recoverable, and in this case it is said: "Insult and abuse accompanying a breach of contract cannot affect the amount of recovery in such actions. If the action is based upon a wrong, the jury are permitted to consider injury to feelings, and many other matters which have no place in actions to recover damages for breach of contracts."¹ It is enough to say here that the action at bar is *ex delicto*, or that damages may be recovered as if it were, under our system of code pleading.

The only other case having any bearing upon this question is *Hall v. Incorporated Town of Manson*, 90 Iowa, 585, 58 N. W. Rep. 881, which was a case wherein plaintiff sought to recover damages for personal injuries sustained by reason of a defective street crossing. The lower court instructed the jury that plaintiff might recover "for the peril, if any, the jury may find she was subjected to, from the evidence in the case." This court disapproved the instruction, not because damages for mental anguish could be recovered, but because, "in our view of the instruction, its wording would warrant the jury in allowing damages for mental pain and suffering which would include peril, and also for peril, as a distinct, independent, and additional element of damage, thereby allowing double compensation for the peril plaintiff was in, which would be erroneous."

From these cases it is apparent that in actions of tort this court has frequently announced the rule that damages for mental suffering may be recovered, although there is no physical injury. And, if this be so, why is not this a case where they ought to be allowed? It cannot be possible that here is a legal wrong for which the law affords no remedy. The wrong is plain, the injury is apparent, and we think the law affords a remedy, for compensatory damages, under the rules above given. It must not be understood to follow that, in all actions *ex delicto*, damages for mental suffering may be allowed. There must be some direct and proximate connection between the wrong done and the injury to the feelings, to justify a recovery for mental anguish. But, when this connection is so manifest as in the case at bar, we think such damages ought to be allowed. It is very appropriately said, however, in one of the cases which has been cited, that "great caution should be used in the trial of cases like this, as it will be so easy and natural to confound the corroding grief occasioned by the loss of a parent or other relative with the disappointment and regret occasioned by the fault or neglect of the company, for it is only the latter for which recovery may be had; and the attention of juries might well be directed to this fact." It is not necessary for us to determine on which theory damages for mental anguish are recoverable. If we find they are recoverable, either in an action for breach of contract, or by reason of a breach of public duty, then the instruction given by the lower court was correct, and should be sustained. It will be noticed that, in some of the cases holding to a

¹ Citing *Walsh v. Railway Co.*, 42 Wis. 23.

contrary doctrine from that here announced, recovery was denied because of the form of action ; that is to say, it was held that the action in the particular case was for breach of contract, and that damages for mental suffering were not recoverable in such an action. Whether they would be recoverable in actions *ex delicto* or not was not determined.¹

Judgment affirmed.

TURNER v. STALLIBRASS.

COURT OF APPEAL, NOVEMBER 22, 1897.

[(1898) 1 Q. B. 56.]

Appeal from an order of a judge at chambers as after-mentioned.

The action was brought to recover damages in respect of injury to a horse belonging to the plaintiff. The statement of claim alleged that the plaintiff delivered to the defendants a horse, the property of the plaintiff, to be agisted, kept, and taken care of by the defendants in consideration of a payment of one shilling a day by the plaintiff to the defendants ; and the defendants promised the plaintiff in consideration of the premises to safely keep, agist, and take care of the said horse ; and that in breach of the said contract the defendants did not safely keep, agist, and take care of the said horse, but negligently erected in the field in which the said horse was turned out a low wire fence, and negligently permitted the grass to grow so as to hide the said wire fence, whereby the plaintiff's horse was injured. Alternatively, the statement of claim alleged that the defendants in breach of their contract negligently allowed the said horse to be kept and remain in a field containing the said wire fence so concealed as aforesaid, whereby the plaintiff's horse was injured.

It appeared at the trial that the plaintiff had delivered the horse in question to the defendants for agistment, and that the horse had been placed in a field where there was a barbed wire fence concealed by long grass, through which injury had been occasioned to the horse. The learned judge left it to the jury to say whether it was negligent on the part of the defendants to put the horse in a field where there was such a fence as that in question. The jury found for the plaintiff for 30*l.* damages. The master held on taxation that the plaintiff was entitled to the costs of the action on the High Court scale ; but on appeal the judge reversed his decision, holding that the action was one founded on contract within the meaning of s. 116 of the County Courts Act, 1888, and therefore the plaintiff was only entitled to costs on the county court scale.

¹ KINNE, J., dissented, holding that the general rule that damages are not recoverable for mental pain and suffering should govern the case at bar. The reasoning of both the majority and the dissenting opinion on this point of substantive law is omitted.

T. Willes Chitty, for the plaintiff.

Lyttelton, for the defendants.

A. L. SMITH, L. J.—¹ I am of opinion that this is an action founded on tort within the meaning of s. 116 of the County Courts Acts, 1888. The rule of law on the subject, as I understand it, is that, if in order to make out a cause of action it is not necessary for the plaintiff to rely on a contract, the action is one founded on tort; but, on the other hand, if, in order successfully to maintain his action, it is necessary for him to rely upon and prove a contract, the action is one founded upon contract. The question is under which class the present action falls. It was held in *Bryant v. Herbert*² that for this purpose the form of the action as stated in the pleadings is immaterial. In my opinion the way in which the plaintiff's counsel opened his case at the trial is equally immaterial; and, if it be material to consider how the judge directed the jury, in this case it is clear that he directed them substantially as if the action were one of tort, not of contract; for he asked them whether it was an unreasonable or negligent thing to have such a fence as this in a field in which cattle were kept. The question is whether upon the facts of the case this was an action which could be maintained without relying on the contract of agistment. I think that the plaintiff shewed a good cause of action by proving a bailment on which a duty arose at common law on the part of the defendants not to be negligent in respect of the plaintiff's horse, independently of any contract, and breach of that duty. On that short ground I think this was an action founded on tort within the meaning of the enactment of the County Courts Act, 1888, as to costs. For these reasons I think the appeal must be allowed.

RIGBY, L. J.—I am of the same opinion. The enactment on which this case depends divides actions into two classes for the purpose of discriminating between them with regard to costs, namely, actions founded on contract and actions founded on tort. The question whether an action falls within one class or the other depends on the facts of the case, not on the form in which the action is brought. It has long ago been settled that the form of the pleadings is for this purpose immaterial. The rule is that, if the plaintiff, in order to shew a cause of action, must rely on a contract, the action is one founded on contract; otherwise it is one of tort. I think that in this case the plaintiff was not obliged to rely on a contract, and therefore the action must be treated as one founded on tort.

COLLINS, L. J.—I am of the same opinion. I think some confusion may possibly arise from the expression of the rule on this subject as being that the test is whether the plaintiff is obliged, in order to maintain his action, to rely on a contract. The relation of bailor and bailee must arise out of some agreement of the minds of the parties to it; but

¹ The arguments are omitted.

² 3 C. P. D. 389.

that agreement of minds is not the contract contemplated by that mode of expressing the rule to which I refer. Such an agreement of minds is presupposed in the case of any relation which brings about the common law liability of a bailee to his bailor. Where such a relation is established, the result of the cases appears to be that, if the plaintiff can maintain his action by showing the breach of a duty arising at common law out of that relation, he is not obliged to rely on a contract within the meaning of the rule; but, if his cause of action is that the defendant ought to have done something, or taken some precaution, which would not be embraced by the common law liability arising out of the relation of bailor and bailee, then he is obliged to rely on a contract within the meaning of the rule. A distinction has been drawn between acts of misfeasance and non-feasance which has given rise to some difficulty; but it seems to me that, whether the matter complained of is one of misfeasance or non-feasance, the question really is whether it is embraced within the ambit of the common law liability arising out of the relation between bailor and bailee. If it is, then the plaintiff is not driven to rely on a contract within the meaning of the rule on the subject of costs. But, if it is not, then the plaintiff must rely on a contract in order to shew a cause of action, and the action is therefore one founded on contract. In the present case it is quite clear that the duty upon a breach of which the action was founded was one which arose at common law simply out of the relation of bailor and bailee, and therefore the plaintiff was not driven to rely on the contract. I quite agree that this question does not depend on the form of the pleadings; but the case of *Corbett v. Packington*,¹ which was decided at a time when it was essential that the pleader should accurately state the cause of action, illustrates what I have said with regard to the distinction between the liability arising at common law out of the relation of bailor and bailee, and any further liability arising on the terms of the contract of bailment. It was held in that case that a count alleging that the plaintiff had delivered certain boars and pigs to the defendant to be taken care of for reward, and that the defendant had in consideration thereof agreed with the plaintiff to take care of them, and redeliver the same to the plaintiff on request, was a count in assumpsit, and could not therefore be joined with counts in case, because the alleged obligation to redeliver the pigs went beyond the common law duty of the defendant as bailee, and could only arise out of the contract.

Appeal allowed.

¹ (1827) 6 B. & C. 268.

JACOBSON *v.* BROOKLYN ELEVATED RAILROAD COMPANY.

SUPREME COURT OF NEW YORK, SPECIAL TERM, JANUARY 22, 1898.

[48 *N. Y. Supp.* 1072.]

Action by Arthur C. Jacobson individually, and himself and another, as executors of the last will of Mary Jacobson, against the Brooklyn Elevated Railroad Company and others, for an assessment of damages, and for an injunction unless such damages be paid. As to the executors, sent to the jury calendar. As to the plaintiff Jacobson individually, judgment against defendants.

Stephen M. Hoye, for plaintiff.

Alex. S. Lyman, for defendant.

GAYNOR, J.—Counsel for the company moved before any witness had been sworn, and again at the close of the evidence, that the claim for damages for loss of rents which accrued prior to September 12, 1896, when the plaintiff Jacobson got title by devise from his mother, be sent to the jury calendar for trial, and that the court try in equity only the case of the said owner. Upon the death of the said mother her claim for damages passed to her executors. They have no interest in restraining the maintenance and operation of the road. Their claim is disconnected from the land, and is the basis for a common-law action for damages only. On the other hand, the mother's devisee (the plaintiff Jacobson) had a separate claim for damages since he became owner, and also a right of action to restrain the future maintenance and operation of the road; but he has a standing in equity to have his damages found and to obtain relief by injunction at the same time.¹ Two distinct causes of action, viz., that of the present owner and that of the executors of the former owner, are therefore improperly united. But the defendant cannot take this objection for not having pleaded it.² Nor has it pleaded that the executors have an adequate remedy at law. But it was not required to do this, for the complaint does not disclose their true position of having only a legal cause of action, but on the contrary it alleges that they with the other plaintiff (Jacobson) are the owners. It does not disclose that the plaintiff Jacobson became the sole owner in 1896 as devisee of their testator. The complaint thus states a good suit in equity only. In such a case the defendant never had to plead that the plaintiffs, or any of them, had an adequate remedy at law, in order to oust chancery of jurisdiction. On the contrary, when the proof showed that instead there was only a common-law action, it was in time to take the objection to the jurisdiction of chan-

¹ *Cogswell v. Railroad Co.*, 103 N. Y. 10; 8 N. E. 537. *Infra*.

² Citing Code Civ. Pro. §§ 498, 499, which provide *inter alia*, that if the objection that causes of action have been improperly united is not taken either by demurrer or answer, it shall be deemed to be waived.

cery then, and the suit had to be dismissed.¹ But that motion has not been made here in respect of the executors, and we therefore have the precise question to decide, viz., whether the action must be severed, and the claim of the executors sent to the jury calendar, for that was the motion made. I think it must be answered in the affirmative. The defendant was entitled to a jury trial thereon, and did not waive it.² It did not plead a misjoinder, nor that the executors had an adequate remedy at law (for that was not true of their cause of action as alleged, and therefore could not be pleaded of it); nor did it move to dismiss their cause of action upon the evidence, which revealed that they had none in equity; but nevertheless they asked in time for a jury trial. That they did this instead of asking for the dismissal which they were entitled to, cannot be found fault with by the plaintiff executors; and I do not dismiss it only because the defendant asks instead that it be sent to the jury calendar.

From the time the road was built to the present, I find that the value of the property has depreciated about \$2,000, one-half of which is permanent damage caused by the road. The plaintiff Jacobson has lost \$60 in rent.

Let the plaintiff Jacobson have judgment for a perpetual injunction unless this sum of \$1,060 be paid.

LECK v. RUDD.

SUPREME COURT OF NEW YORK, TRIAL TERM, APRIL, 1898.

[53 *N. Y. Supp.* 208.]

Action by William Leck, an infant, etc., against John Rudd, to recover damages for breach of contract.

T. E. Murray, for plaintiff.

A. B. Carrington, for defendant.

MCADAM, J.—The complaint charges that the defendant, a wholesale dealer in milk, sold to the plaintiff, for use in his business, a quantity of milk, on the agreement that it should be pure and wholesome; that, relying upon this agreement, the plaintiff received from the defendant, and sold to customers from day to day, certain of said milk, which he believed to be pure and wholesome; that on August 22, 1895, a milk inspector tested certain milk which the plaintiff on that day had received from the defendant under said agreement, and, on September 4th following, caused the plaintiff's arrest for selling adulterated milk; that, upon a trial subsequently had, the plaintiff was convicted of the

¹ *Dalton v. Vanderveer* (Sup.) 29 *N. Y. Supp.* 342; *Wheelock v. Lee*, 74 *N. Y.* 495.

² *Wheelock v. Lee*, 74 *N. Y.* 495; Code Civ. Pro. § 1009.

offence, and fined \$100; and that the publication of his arrest and conviction injured his business.

This is not a case where a vendee is seeking to obtain the difference between the market value and the agreed price of the thing sold; nor is there any allegation that the vendee had paid the agreed price, so as to make such difference recoverable. The action is to recover for a remote consequence of the sale,—injury to the vendee's business, caused by his arrest and conviction,—not within the presumed contemplation of the parties. In order to recover consequential damages of this character, the action should have been brought *ex delicto*; and *scienter* should have been charged, so as to make it one for deceit.¹ It was not so brought, but on the theory of contract.² This was stated by the plaintiff's counsel in his opening. In such form, the action for consequential damages is not maintainable, and for this reason the complaint must be dismissed.

WISNER *v.* THE CONSOLIDATED FRUIT JAR COMPANY.

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FEBRUARY TERM, 1898.

[25 *App. Div.* 362.]

Appeal by the defendant, The Consolidated Fruit Jar Company, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Monroe on the 9th day of August, 1897, upon the decision of the court, rendered after a trial at the Monroe Special Term, overruling the defendant's demurrer to the complaint on the sole ground that it does not state facts sufficient to constitute a cause of action.

George B. Lester, for the appellant.

William A. Sutherland, for the respondent.

FOLLETT, J.—The complaint alleges but one count. Its draughtsman evidently entertained the idea that he was setting forth facts constituting an equitable cause of action for an accounting, but in this he was in error.

An equitable action for an accounting cannot be maintained by a vendee of goods, who has paid money from time to time on the account, against his vendor to ascertain the state of the account, and the fact that the prices for all or some of the goods sold were not agreed upon does not change the rule.

The facts alleged show that for several years before this action was begun the plaintiff purchased goods at various times of the defendant,

¹ Baylies, Code Pl. 161; 5 Am. & Eng. Enc. Law, 318.

² See 26 Am. & Eng. Enc. Law, 72.

for which the plaintiff became liable to pay the defendant their value or their agreed price, and that from time to time the plaintiff paid the defendant sums of money, by which, as the plaintiff alleges, he overpaid the defendant by about \$5,000, which he seeks to recover, and for which he demands judgment. This is simply a legal cause of action. It is true that the plaintiff, in addition to his demand for a money judgment, also demands an accounting, but this does not make the action an equitable one. In case a plaintiff, by accident or design, sets forth a legal cause of action in his complaint, which he erroneously supposes to be an equitable cause of action, and demands a money judgment, a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action will not be sustained. In case a plaintiff has the right to maintain an action at law or a suit in equity, and he elects to bring a suit in equity, demanding only equitable relief, but fails to state sufficient facts in his complaint to constitute an equitable cause of action, and the defendant demurs on the ground "that the said complaint does not state facts sufficient to constitute a cause of action," the demurrer will be sustained, though the facts alleged are sufficient to constitute a legal cause of action; and so, in case he elects to bring an action at law, demanding only legal relief, but fails to state sufficient facts in his complaint to constitute a legal cause of action, and the defendant demurs on the ground "that the said complaint does not state facts sufficient to constitute a cause of action," the demurrer will be sustained, though the facts alleged are sufficient to constitute an equitable cause of action.¹

In such a case a plaintiff has his choice of remedies, and, having made his election, he must, in the face of a demurrer, abide by his election. The case at bar is quite different. On the facts set forth in the complaint, the plaintiff has no equitable cause of action, but has a legal one, and having demanded a money judgment as well as equitable relief, the complaint is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action.¹

The cases of which *Bockes v. Lansing*, 74 N. Y. 437, *Wheelock v. Lee*, 74 N. Y. 495, *Dalton v. Vanderveer*, 8 Misc. Rep. 484, *Fitzsimons v. Drought*, 16 App. Div. 454, are types, holding that when an equitable cause of action is set out in the complaint, the defendant answers, the cause is tried as an equitable one, and the evidence fails to establish an equitable cause of action, the plaintiff cannot recover on the ground that the evidence establishes a legal cause of action, are not in point. An equitable cause of action is not set out in the complaint. This case has not been tried, and, it appearing on the face of the complaint that the trial of the action will involve the examination of a long account, it will necessarily be tried before a referee, neither party being entitled

¹ *Edson v. Girvan*, 29 Hun, 422; *Swart v. Boughton*, 35 Hun, 281; *Willis v. Fairchild*, 19 J. & S. 405; *Fisher v. Charter Oak Life Ins. Co.*, 20 J. & S. 179.

¹ *Porous Plaster Co. v. Seabury*, 43 Hun, 611; *Wetmore v. Porter*, 92 N. Y. 76.

to a trial by jury. Under our code of procedure an equitable action for an account is not sustainable in many cases in which such an action was sustainable under the practice prevailing before 1848. In an action at law the service of a bill of particulars and the production of books and papers may be compelled; the adverse party may be examined before trial, and the issues are usually tried before a referee.¹ The plaintiff has taken upon himself the burden of showing the amount and value of the goods purchased by him and when purchased, and, in case the goods were sold at prices agreed upon, the prices at which they were sold, and also showing the sums which he has paid on account of such goods and when paid. He will not establish a cause of action by simply showing the amounts which he has paid, because his cause of action rests on the theory of overpayment, to establish which he must necessarily prove both sides of the account.

The interlocutory judgment overruling the demurrer should be affirmed, with costs, with leave to the defendant to withdraw its demurrer and answer on the payment of costs.

All concurred.

KRESS *v.* WOEHRLE.

SUPREME COURT OF NEW YORK, APPELLATE TERM, MAY, 1898.

[23 Misc. 472.*]

Appeal by the plaintiff from a judgment rendered in his favor "for moneys loaned; no fraud shown."

The nature of the action and the material facts appear in the opinion.

M. S. Adler, for appellant.

Julius Henry Cohen, for respondent.

GIEGERICH, J.—The plaintiff sued for the recovery of moneys alleged to have been obtained from him by the defendant by fraudulent representations. The justice decided that no fraud was shown, and gave judgment in favor of plaintiff for the amount claimed "for moneys loaned." This was error. If the justice did not believe, as is obvious, that a fraud had been committed, it was his duty to dismiss the complaint, or, upon a conflict of the evidence, to render a judgment in favor of the defendant, and not give judgment for the plaintiff for the sum obtained *ex contractu*.

The form of the plaintiff's action being *ex delicto*, it was incumbent upon him to establish the fact that the defendant was guilty of fraud in

¹ *Marvin v. Brooks*, 94 N. Y. 71, 80.

² S. C. 32 N. Y. Supp. 628.

contracting or incurring the liability, and his allegations were not sustained by the mere proof of a contract and its breach.¹

The judgment cannot stand in any event, because it is not *secundum allegata et probata*.²

The judgment should, therefore, be reversed and a new trial ordered, with costs to the appellant to abide the event.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

YARDUM v. WOLF.

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, AUGUST 10,
1898.

[33 App. Div. 247.*]

Appeal by the defendant, Morris Wolf, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 6th day of July, 1898, denying the defendant's motion to vacate an order of arrest heretofore granted in the action.

Edward A. Alexander, for the appellant.

E. G. Benedict, for the respondents.

Order affirmed, with ten dollars cost and disbursements, on opinion of DALY, J.

Present—BARRETT, RUMSEY, O'BRIEN, and INGRAHAM, JJ.

The following is the opinion of DALY, J.—The defendant is arrested for conversion and moves to vacate the order for alleged insufficiency of the complaint, as indicated in the brief of counsel. It is contended (1) that the complaint shows that the plaintiffs elect to sue upon contract for goods consigned, or their proceeds, and not for conversion; and (2) that the complaint fails to state that the plaintiffs have any property in the goods or any right to immediate possession. The complaint sets forth that the plaintiffs are dealers in rugs, and that two lots of rugs were delivered by them to the defendant (on March 10, and June 2, 1898, respectively), as a factor, on consignment upon an agreement that the defendant should receive the rugs on consignment, as factor, should sell such as he should be able to sell and return to plaintiffs on the sale of all the first lot \$1,759.29, and on the sale of the second lot, \$2,084.05, each rug having a valuation, and the sum of the valuations of the respective lots being the respective sums aforesaid; the defendant to

¹ Citing, *Walter v. Bennett*, 16 N. Y. 250; *Ross v. Mather*, 51 N. Y. 108; *Truesdell v. Bourke*, 145 N. Y. 612; *Kley v. Healy*, 9 Misc. 93; *Smith v. Smith*, 4 App. Div. 227; *Starr v. Silverman*, 23 Misc. 151; 50 N. Y. Supp. 657; *Wright v. Duffie*, 23 Misc. 338.

² Citing, *Fuld v. Kahn*, 4 Misc. 600; *Owens v. Flynn*, 7 Misc. 171; *Kley v. Healy*, 9 Misc. 93. 8 S. C., 54 N. Y. Supp. 192.

receive for his services in selling whatever he should receive over those sums, and in case he should not sell any of said rugs to return them to plaintiffs. The complaint further sets forth that none of the rugs has been returned, and that as to the first lot defendant has refused to inform plaintiffs how many he has sold; that he has paid \$300 on account of their value, and has refused on demand to return any of them or the proceeds thereof, and has converted to his own use all the rugs which he has not sold, and all the money for which the rugs have been sold by him as factor, except the said sum of \$300; and as to the second lot, that he has not returned any of said rugs, nor the money for which he has sold any of the same, but has converted to his own use the rugs or the money; that plaintiffs have demanded of defendant that he should return the rugs, or such of them as he had not sold, and the proceeds of any which he has sold, if any, but that the defendant has refused so to do. As to the first lot it is alleged that, by reason of such conversion, the plaintiffs are entitled to have of defendant the said sum of \$1,759.29, less the payment of \$300, and an allowance of \$75 on previous transactions, making the amount \$1,384.29. As to the second lot it is alleged that the defendant, by reason of the premises, is indebted to the plaintiffs in the sum of \$2,084.05, and the plaintiffs demand judgment for the said sums, with interest on each.

There is no ground for the contention that the plaintiffs have waived the tort and elected to sue on contract. *McDonough v. Dillingham*, 43 Hun 493, is cited by defendant's counsel. In that case the complaint set up a cause of action on contract, with allegations of fraud in contracting the debt, and it was held that the action was upon contract, the allegation of fraud being added under section 549 of the Code. The decision has no bearing upon this case. The causes of action here are characterized by the allegations of conversion, and those allegations evince the plaintiffs' election to sue for the tort. There is no ambiguity nor uncertainty on this point in the complaint, and so the demand for judgment for the specific valuations fixed by agreement upon the goods instead of a demand for damages, and general allegations of damage have no significance. Nor is the objection that the complaint does not allege ownership nor right of possession of plaintiffs well taken. It is true that ownership or right of possession must be pleaded and proved to sustain an action for conversion; but, so far as the pleading is concerned, it is sufficient if facts are set forth which show property or right of possession in the plaintiff. Bare possession of property or mere prior possession is sufficient to sustain trover.¹

An allegation of possession imports lawful possession, and an allegation "that the property, after being in the possession of the plaintiff came into the possession of the defendant, who, although often requested so to do, has not delivered the same to the plaintiff, but

¹ *Duncan v. Spear*, 11 Wend. 54, and note.

wrongfully detains the said goods from him," is sufficient, if true, to establish conversion.¹

The facts pleaded in this complaint show that the rugs after being in possession of plaintiffs came into possession of defendant, for they were delivered to defendant by plaintiffs to be sold. This prior possession of plaintiffs is to be presumed lawful. Wrongful detention is shown by defendant's refusal to deliver on demand of his principals, which he was bound to do, no right to detain them against the demand of the principals being shown. On the contrary, the refusal of the agent to account, that is, to state how many rugs had been sold, gave immediate right to demand the return of the goods on hand and the proceeds of any that had been sold. Refusal to comply with that demand was wrongful, and a cause of action for conversion was sufficiently set forth by pleading those facts.

Motion to vacate order of arrest denied, with ten dollars costs.

PICKENS v. SOUTH CAROLINA AND GEORGIA R. R. CO.

SUPREME COURT OF SOUTH CAROLINA, MARCH 25, 1899.

[54 S. C. 498.]

MR. JUSTICE GARY.—The complaint sets forth two causes of action, the first of which is as follows:

I. The first paragraph alleges the corporate existence of the defendant.

"II. That at the said times, the defendant was operating in connection with its railroad, the Carolina, Cumberland Gap and Chicago Railroad, the same being a line of railway running from the city of Aiken, in this state, to the town of Edgefield, also in this state, and then owned by the Carolina, Cumberland Gap and Chicago Railway Company, which was also a corporation created by and under the laws of this state.

"III. That on or about the 31st day of March, 1896, the plaintiff, for a valuable consideration, purchased of the defendant company at the depot of the Carolina, Cumberland Gap and Chicago Railway, at the town of Edgefield, a round trip ticket, which entitled the plaintiff to passage from the town of Edgefield over the railway of the said Carolina, Cumberland Gap and Chicago Railway Company, via the said city of Aiken, thence over the railway of the defendant company to the city of Augusta, in the State of Georgia, which said ticket was limited to a period of ten days from the date of issuance. And that the plaintiff did accordingly, on or about the — day of March, 1896, board a passenger car of defendant at Edgefield, and in due course of travel was carried by virtue of said ticket to the said city of Augusta; and after remaining in said city several days, the plaintiff did, on or about the — day of April, 1896, and within the period limited by said ticket, board the train of the defendant company, for the purpose

¹ Sheldon v. Hoy, 11 How. Pr. 11, 16.

of returning to the town of Edgefield upon said ticket, as was provided by the terms of the contract thereon stated; but that when the plaintiff reached the city of Aiken on the said return trip, the defendant, in disregard of its said contract as contained upon said ticket, and of the rights of the plaintiff, negligently failed to carry or to provide for the carriage of the plaintiff from said city of Aiken to the said town of Edgefield, and left her in said city of Aiken. And the plaintiff further alleges that by reason of the failure of the defendant to carry her back to said town of Edgefield, she was exposed to a severe storm of sand, wind, and rain, which brought on her a severe attack of sickness, and caused her to be confined to her bed and house for upwards of two months, and caused her severe pains and suffering, and has thereby caused her health to be permanently impaired, so that she is not as strong and healthy as she was before being exposed to said storm, through the negligence of the defendant in not providing her with passage back to the town of Edgefield, as aforesaid, to the injury and damage of the plaintiff in the sum of \$2,000."

The second cause of action is similar in its allegations to the first, except it alleges that the defendant's wrongful act was willful, grossly negligent, and in wanton and reckless disregard of the plaintiff's rights, and that she was damaged in the sum of \$5,000.

The jury rendered a verdict in favor of the plaintiff for \$3,000, and the defendant appealed upon exceptions, the first of which is as follows: "1. That his Honor, Judge Watts, the presiding Judge, erred in permitting the plaintiff, as a witness upon the stand, against the objection of the defendant, to testify that she was caught in a storm of sand and rain after she left the depot of the defendant company at Aiken, and to testify that she received injuries from said storm. For the reason, it is submitted, that this action is for a breach of contract and not a tort, and such damages are too remote, and would not enter into the proper measure of damages for the cause of action set forth in the complaint."

The first question raised by this exception is whether the action is for a breach of contract or a tort. The allegations of the first cause of action are appropriate to an action of tort arising from negligence, and the second cause of action is found upon a tort growing out of alleged willfulness or intentional wrong. The cases of *Head v. R. R. Co.*, 7 S. E. R. (Ga.) 217, *Purcell v. R. R. Co.*, 12 L. R. A. (N. C.) 113, and *Hansley v. R. R. Co.*, 32 L. R. A. (N. C.) 543, as well as many others that could be cited, show that an action of tort can be brought for such alleged violation of duty; and the case of *Hammond v. R. R. Co.*, 6 S. C. 130, which was an action by a passenger to recover damages for injury caused by defendant's negligence, shows that the recital of the contract was not for the purpose of "founding a right to a recovery for the breach of the contract." The Court further says: "It was not referred to as the foundation of his action. It may be that his complaint would not have been open to any exception, if he had omitted all reference to it. It was introduced to show that he was not

an intruder on the train of the company. It was merely preliminary to the statement of his real cause of action, and if necessary to its support, he could have offered proof of it without setting it out in his complaint." Parenthetically, we may remark that the case of *Purcell v. R. R. Co.* and *Hansley v. R. R. Co.*, supra, are in seeming conflict; but when carefully considered it will be seen that the Court reached the correct conclusion in each of them. In the case of *Purcell v. R. R. Co.*, the intentional wrong of the defendant was the direct cause of the injury, while in the case of *Hansley v. R. R. Co.*, an efficient cause intervened, to wit: the breaking of the axle, which was not intentional.¹

WARD v. SAINT VINCENT'S HOSPITAL.

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, APRIL 21,
1899.

[39 App. Div. 624.²]

Appeal by the plaintiff, Helen D. Ward, from a judgment of the Supreme Court in favor of the defendant, entered upon the verdict rendered by direction of the court, and also from an order denying the plaintiff's motion for a new trial made upon the minutes.

Edward C. James, for the appellant.

Austen G. Fox, for the respondent.

BARRETT, J.—The appellant contends that this action is brought to recover damages because of the breach of an express contract whereby the defendant agreed to furnish her a skilled, competent, and trained nurse. We see no reason to doubt the accuracy of this contention. Such an express contract is averred in the complaint, also its breach and damages resulting therefrom. The learned trial judge held that the action was exclusively in tort and that the contract alleged was material only in the sense in which the payment of fare is material in an action for personal injuries by a passenger against a carrier. He thus held that the action was essentially for a breach of duty, and having reached the conclusion that no such breach of duty was proved, he directed a verdict for the defendant. It is not necessary, in our view of the gravamen of the complaint, to consider the correctness of the latter conclusion. While there are phrases in the complaint which refer to the defendant's duty, yet this duty is always predicated upon the express contract alleged. In one instance the plaintiff avers that, "pursuant to the terms of said contract," the defendant received the

¹ The judgment below, which had been for plaintiff, was however reversed upon another point.

Only so much of the opinion is given as refers to the question of pleading.

² S. C. 57 N. Y. Supp. 784.

plaintiff in the hospital; in another that, "in consideration of the premises," which embrace the contract, the defendant "undertook and contracted," etc.; in yet another that, "by reason of the premises"—still the contract—"it became and was the duty of the defendant to furnish," etc.; and finally that, being in the hospital, "under and in pursuance of said contract," the defendant negligently and unskillfully failed or omitted to furnish, etc. It is impossible to analyze this complaint without seeing that the breach of the defendant's contract is throughout the gravamen of the action. The plaintiff even alleged, as in an ordinary action upon contract, that she "has complied with all the terms and conditions of said contract, and has fully discharged all her duties and liabilities thereunder." Treating the phrases suggestive of a duty most favorably to the defendant, we still have an action founded upon the contract. As was said in *Orange Bank v. Brown*, 3 Wend. 158, 169: "If the plaintiff states the custom, and also relies on an undertaking general or special, . . . then the action may be said to be *ex delicto quasi ex contractu*; but in reality is founded on the contract, and to be treated as such."

The learned judge here applied by analogy the ordinary rule in actions against carriers. That rule, however, permits the injured passenger to maintain an action, either in contract or in tort at his election; that is, either what was formerly *assumpsit* for the breach of the contract, whether express or implied, or on the *case* for the wrong.

In the present case, the contract was express. It settled all questions of general duty attached by law, and became the criterion of the defendant's specific duty in this particular case. And it was a contract which the defendant certainly had power to make. Though the defendant is what is termed a charity hospital, it has its "pay" side. Upon the latter side, it was in the habit of furnishing private rooms and nurses to well-to-do people for a full price. For the breach, then, of that express specific and valid contract, the plaintiff was entitled to the same damages as though the action had been for negligence pure and simple. In either case she was entitled to compensation, that is, to an adequate indemnity for her injuries, no more and no less.

There was ample evidence of the express contract thus pleaded. The testimony adduced by the plaintiff is most explicit on this head.¹

It follows that the judgment and order appealed from should be reversed and a new trial granted, with costs to appellant to abide the event.

VAN BRUNT, P. J., RUMSEY, and PATTERSON, JJ., concurred.

Judgment and order reversed, new trial granted, costs to appellant to abide event.

¹ Part of the opinion, discussing the evidence, is omitted.

BRAWLEY v. SMITH AND OTHERS.

COURT OF APPEALS OF KANSAS, OCTOBER 17, 1898.

[—*Kan. App.*—¹]

From a judgment for defendants, plaintiff brings error. His petition asserted, in substance, ownership and right of possession of certain notes and mortgages therein described, and that he had allowed the defendant Farr to deposit these notes and mortgages with the defendant the Exchange Bank of Stockton, to secure the note of the defendants Felix Smith and George O. Farr for \$959.50, falling due May 15, 1895. It was then averred as follows:

"Plaintiff believes, and alleges the fact to be, that by agreement between the said bank and the said Smith and Farr the bank received certain other mortgage security, and the payment of interest, and in consideration extended the time of the payment of their said note several times, and by reason thereof said bank has relinquished its right to this plaintiff's notes and mortgages sued for. Wherefore plaintiff prays a disclosure of the facts by the defendants, and, if found that said note has been extended, that the plaintiff's notes and mortgages be returned to him, but, if the court finds that said note has not been extended, that the court render judgment in favor of the plaintiff, for the use of said bank, against said Smith and Farr, for the amount due on their note to said bank, and foreclose the mortgage last given by them as security therefor, and that plaintiff have return of his notes and mortgages, and all other equitable relief."

To this petition the defendants demurred—*First*, because several causes of action are improperly joined; and, *secondly*, because "said petition does not state facts sufficient to constitute a cause of action." The demurrer was sustained on both grounds as to all the defendants except the bank, and was sustained in favor of the bank on the first ground, and overruled as to the second. Thereupon the action was dismissed by the court as to all the defendants except the bank, and the plaintiff was required to elect whether he would proceed in equity, or at law, as in replevin; and, duly objecting to such order, the plaintiff elected the latter.

WELLS, J.—In this action there was error. The petition stated a cause of action, and but one. If the allegations of the petition were true, and by reason of extensions the surety has been released, then the plaintiff was entitled to a restitution of his property; but if the surety has not been released, and the other allegations of the petition were true, then the plaintiff was entitled to have the matter closed up, the security of the principal debtors exhausted, and the balance made from his security, and the remainder turned back to him. And in this Smith and Farr were necessary parties. In relation to the order of the

court compelling plaintiff to elect a name for his cause of action, we quote from the language of Mahan, P. J., in *Freeman v. Trickett*, 6 Kan. App. 84, 49 Pac. 672: "Our Code of Civil Procedure has abolished all forms of action, and has declared that there shall be but one form of action, which shall be called 'a civil action.' It provides that the plaintiff shall state the facts constituting his cause of action concisely, without repetition, and it then becomes the duty of the court to say whether or not it states a cause of action, and to what relief the plaintiff is entitled; but it is unnecessary to say whether it would have been called at common law by this, that, or the other name. The court simply has to determine whether the rights of the plaintiff have been violated by the acts of the defendant, and, if so, what the plaintiff's measure of recovery is."

It is not necessary to consider the other allegations of error in this case. The judgment is reversed, and the case remanded, with directions to grant a new trial, and to overrule the demurrer to the petition.

PARKER v. PULLMAN & CO.

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, JANUARY 3,
1899.

[36 *App. Div.* 208.¹]

Appeal by the defendant, John Pullman & Co., from an interlocutory judgment of the Supreme Court in favor of the plaintiff, upon the decision of the court rendered after a trial at the Kings County Special Term overruling the said defendant's demurrer to the complaint.

Harold Nathan, for the appellant.

Charles A. Boston, for the respondent.

GOODRICH, P. J.—The demurrer brings up two questions: *First*, the right of the plaintiff to maintain an equitable action for an accounting under the terms of the agreement set forth in his complaint; and, *second*, the defendant's right to test the question by demurrer.

The complaint alleges that the plaintiff is a resident of this state and the defendant corporation a foreign corporation; that on August 18, 1892, a written contract, of which a copy is annexed to the complaint, was executed between the parties to this action, whereby the plaintiff and the defendant Parker, former employees of the corporation, should continue in its employ until the same was terminated on sixty days' written notice; that the plaintiff was to have general charge of the factories of the corporation, one situated in Brooklyn and the other in Baltimore, Maryland, to engage and discharge all employees, to have charge of deliveries of goods manufactured, and to perform such other

¹ S. C. 56 N. Y. Supp. 734.

services as might be required of him in the business; that the defendant Parker was to have charge of all other matters relating to the office in Brooklyn; that all sales of goods manufactured at the factories were to be made through the corporation, and on the first day of August in each year an account of stock should be taken, and the profits of the business carried on at said factories, if any, should be ascertained and apportioned, two-sixths to the corporation, three-sixths to the plaintiff, and one-sixth to the defendant Parker; that if either of the Parkers should leave the employ of the corporation, and an account of stock was not taken at that time and the profits of the business ascertained, either of them so leaving should be entitled at the next taking of stock to his timely proportion of the year's profits; that no part of the profits should be withdrawn by either of the Parkers until the business should show a profit of \$1,000 over all advances, debts, and liabilities, including the amount then invested by the corporation in the business, the value of which was stated to be \$14,704.20; that the plaintiff had the privilege of purchasing the business and property upon giving sixty days' written notice, and paying the corporation the value, as shown by the books; that the defendant Parker was discharged September 27, 1896; that on June 25, 1897, the corporation, without written notice, closed the factory in Brooklyn, to which the property in the Baltimore factory had been removed in June, 1896, and sold all the stock, goods and merchandise to persons unknown to the plaintiff, and retained the moneys received therefor; that there has never been any ascertainment or apportionment whatsoever, as provided in the written agreement, of the profits of the business, and that the plaintiff has repeatedly since his discharge demanded a full and complete accounting of the dealings and transactions in said business and a payment to him of the amount due him, which the corporation has refused; that the corporation has collected and retained the moneys on all sales of merchandise, and has taken possession of the books in which the accounts were kept; "and that the said accounts are long and complicated, and no settlement thereof has been made between the plaintiff and the defendants," although the profits on such sales and deliveries were large, and the amount is unknown to the plaintiff.

The contract contains the following provision: "That said J. Kos Parker and Leonard S. Parker are employees of said John Pullman & Company and not copartners with them. That they have no control or interest in said business except as employees, and it is expressly agreed by and between the parties hereto that the interest in the profits of said business, which is to be set apart or paid to either of said Parkers, is for salary or compensation as such employees of John Pullman & Company."

The plaintiff demands judgment that an "account may be taken between the plaintiff and the defendants of all and every of the dealings

and transactions of the said business, and that the said John Pullman & Co. pay unto the plaintiff the amount found to be due to the plaintiff under said accounting."

The defendant corporation demurred to the complaint, the court overruled the demurrer, and from the interlocutory judgment the corporation appeals. . .

As to the second question,¹ the right of the defendant to test jurisdiction by demurrer depends partly upon §§ 481 and 1207 of the Code of Civil Procedure. The former provides that a complaint must contain, *first*, the title of the action, the name of the court and the names of the parties; *second*, a statement of the facts constituting the cause of action; and *third*, "a demand of the judgment to which the plaintiff supposes himself entitled." But this does not mean that the plaintiff may not have any other judgment than he demands, although § 1207 provides that where there is no answer the judgment shall not be more favorable to the plaintiff than he has demanded in his complaint. This clearly relates, not to an action where a demurrer has been interposed, but to one where a judgment is to be entered by default; and the reason is plain, a party may be willing to permit a judgment by default, not more favorable than that which is demanded in the complaint; but when he demurs, as in the present instance, his claim is that the plaintiff is entitled to no relief whatever on the allegations of the complaint, for the demurrer here is that the "complaint does not state facts sufficient to constitute a cause of action;" in other words, that the plaintiff is entitled to no judgment whatever.

Under our present system of pleading a plaintiff is entitled to such relief as the allegations of the complaint justify, irrespective of the prayer for judgment.²

In the last case, *Wetmore v. Porter*, the court said (p. 80): "It has been repeatedly held, under the Code, that if the facts stated in a complaint show that the plaintiff is entitled to any relief, either legal or equitable, it is not demurrable upon the ground that the party has not demanded the precise relief to which he appears to be entitled."

The judgment must, therefore, be affirmed with costs.

All concurred.

Interlocutory judgment affirmed, with costs, with leave to the appellant to withdraw demurrer and serve answer within twenty days on payment of the costs of demurrer and of this appeal.

¹ The reasoning of the court on the first question, namely, whether the plaintiff had a right to an accounting under the terms of the agreement set forth in the complaint, is omitted. The answer, after a review of the authorities, English and American, is in the affirmative.

² Citing *Emery v. Pease*, 20 N. Y. 62; *Wright v. Wright*, 54 N. Y. 437; *Williams v. Slote*, 70 N. Y. 601; *Wetmore v. Porter*, 92 N. Y. 76.

DAVIS v. MORRIS.

COURT OF APPEALS OF NEW YORK, JUNE, 1867.

[36 N. Y. 569.]

GROVER, J.—This action was brought by the plaintiff as receiver, to recover rent due upon a lease of lot 212 Broadway, in the city of New York, given by the plaintiff's predecessor, as receiver, to Hudson, one of the defendants. The plaintiff claimed to recover against the defendant Morris, upon equitable grounds, and therefore brought the case to trial at a Special Term, when the defendants insisted that the cause should be tried by jury. This was denied by the court, and the cause tried without a jury. The defendant's counsel now insists that this was a waiver by the plaintiff of any right of recovery upon strictly legal grounds, and that unless it appears upon the trial that the plaintiff was entitled to recover in equity, the judgment dismissing the complaint should be affirmed, although it appeared that the plaintiff was entitled to recover at law. This position cannot be maintained. The Code, section 69, abolishes the distinction between actions at law and suits in equity, and provides that thereafter there shall be in this State but one form of action for the enforcement or protection of private rights, etc. Section 142 provides that the complaint shall contain a plain and concise statement of the facts constituting a cause of action. When, as in the present case, the complaint states facts showing, as the plaintiff claims, a right of recovery both in equity and at law, the question as to how the case is to be tried arises. The constitution, article 2, section 2, provides that the trial by jury in all cases in which it has heretofore been used, shall remain inviolate forever, but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. At the time of the adoption of the constitution all cases at common law were tried by jury. It follows that any party has a right to have any such action so tried at the present time, and that he cannot be deprived of this right if defendant, by the plaintiff including in his complaint a statement of facts arising out of the same transaction showing a right of recovery in equity. Suits in equity were never tried by jury unless an issue was ordered by the court for the trial of some specific fact. Under the Code it is clear that the facts entitling the party to both kinds of relief may be included in the same complaint and both attained in the same action, when arising out of the same transaction. The right founded upon the common law must be tried by jury, and it would seem to follow necessarily that the entire cause must be so tried, as no provision is made for two trials of the issues joined in the same action. It would follow that when a plaintiff moved the trial of a cause at Special Term, and the defendant demanded that it be tried by jury, that the judge must determine whether any of

the grounds upon which a recovery was sought were such as at the adoption of the constitution were redressed solely by an action at law, and if so should direct the cause to be tried by jury at circuit, or at all events should refuse to try the cause without a jury.

But should the judge decide erroneously in this respect, and proceed to try a cause without, which should be tried by jury, on motion of the plaintiff, it would not operate as a waiver of any of the legal rights of the plaintiff; and should the plaintiff fail to show himself entitled to any equitable relief, but should show a right to legal relief, the judge should not dismiss the complaint, but still order the case to be tried by jury, as an action at law. If the above views are correct, it follows that it must be determined, in the present case, whether the plaintiff could recover the rent, or any portion of it, of Morris, either at law or in equity.¹

COGSWELL *v.* NEW YORK, NEW HAVEN & HARTFORD
RAILROAD COMPANY.

COURT OF APPEALS OF NEW YORK, APRIL 19, 1887.

[105 *N. Y.* 319.]

Appeal from order of the General Term of the Superior Court of the city of New York, made December 28, 1886, which affirmed an order of Special Term granted on motion of the plaintiff, awarding and settling the issues herein to be tried by a jury. The order was made, as stated therein, "on the ground that a trial by jury is a matter of right in this action."

The nature of the action is stated in the opinion.

Henry H. Anderson, for appellant.

Lewis Johnston, for respondent.²

ANDREWS, J.—The complaint demands both legal and equitable relief. It prays judgment for damages and an abatement of the nuisance complained of, and also for an injunction restraining the defendant from continuing the nuisance and from permitting its lands to be used for the purpose of carrying on any operation thereon which shall injure the plaintiff in the enjoyment of her property. The remedy for damages and for the abatement of a private nuisance, could at common law be obtained in a legal action, technically known as an assise of nuisance. It was a part of the judgment that the nuisance be abated.³ The legal

¹ Only so much of the case is given as refers to the one point. The judgment below was affirmed, the court holding that plaintiff was not entitled to recover either at law or in equity.

² The arguments are omitted.

³ Citing 3 Black. Com. 220; *Waggoner v. Jermaine*, 3 Den. 306.

remedy by writ of nuisance for the recovery of damages and an abatement of the nuisance, was retained by the Revised Statutes¹ and though the proceeding by writ of nuisance has been abolished, the same relief may be now had in an ordinary civil action under the Code.²

It was held in *Hudson v. Caryll*³ that as by the common law an action for damages and for the abatement of a nuisance was triable by jury, the defendant could not be deprived of the right to a jury trial upon these issues, although the plaintiff in his complaint also demanded equitable relief. In the present case the plaintiff is the party insisting upon the right to a jury trial, notwithstanding the fact that she framed her action asking, not simply the relief which could be obtained by a writ of nuisance at common law, but also relief by injunction, which a court of law was not competent to grant. The constitution⁴ secures to a party the right to a jury trial in all cases where before its adoption this mode of trial was used. This is not a case which as a whole, and in both aspects, was triable by jury at the adoption of the constitution, nor is it one where, under the present system, the plaintiff is compelled to unite her claims for both equitable and legal relief in the same action. Rights may be waived, or a party may by his own act preclude himself from asserting them. We think it is a reasonable rule and one in consonance with the authorities, that where a plaintiff brings an action for both legal and equitable relief in respect to the same cause of action, the case presented is not one of right triable by jury under the constitution, and that the plaintiff, by such election, submits to have the issues tried by the court, or by the court with the aid of a jury, as the court in its discretion may determine, according to the practice in equity cases.⁵ This is not, we think, an action for a nuisance within section 968 of the Code of Civil Procedure. The action of nuisance is mentioned in the section together with other common law actions, all of which must, the section declares, be tried by jury, unless a jury is waived or a reference is directed. Reading the section in connection with section 1660, it is clear, we think, that an equitable action to restrain the continuance of a nuisance demanded is not action for nuisance within section 968.

This leads to a reversal of the orders of the Special and General Terms, but as the courts below decided the motion on the question of power solely, the case should be remitted to the Special Term for the exercise of its discretion.

All concur.

Ordered accordingly.

¹ 2 Rev. Stats. 332.

² Code Pro. § 454; Code Civ. Pro. § 1662

³ 44 N. Y. 553, 554.

⁴ § 2, Art. 1.

⁵ Citing *Davison v. Associates of the Ferry Co.*, 71 N. Y. 333; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 Id. 30, 46; *Baird v. Mayor, etc.*, 74 Id. 382. See also *Lynch v. M. E. R. Co.* (1891), 129 N. Y. 274, 284.

CHAPTER III.

IN WHOSE NAME THE CIVIL ACTION SHOULD BE BROUGHT.

SECTION I. THE TERMS OF THE STATUTE.

A. *The Leading Original Enactments.*

NEW YORK: Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in § 113. (*Co. Pro.*, 1849, § 111.)

In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defence existing at the time or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due. (*Co. Pro.*, 1849, § 112.)

An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the suit is prosecuted. (*Co. Pro.*, 1849, § 113.)

NOTE.—EARLY AMENDMENTS IN NEW YORK.

The terms and the section numbers of the enactments of the New York Code on this point were fixed, for many years, by the amended code of 1849. To these sections, however, three other provisions were added by the New York Legislature in 1851 and 1866, and have had more or less of a following outside New York. Their terms, and the terms of the original enactments of 1848, appear in the following note; the section numbers are those of the code of 1849.

Sec. 111. The terms of the code of 1848 were the same as those given in the text, excepting a change in the section numbers, then § 91 and § 93.

In 1851 the section, as given in the text, was amended by the addition of the following clause: "*but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract.*"

In 1866 the section was further amended by the addition of the following sentence: "*But an action may be maintained by a grantee of land in the name of a grantor, or his or her heirs or legal representatives, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant, and the plaintiff shall be allowed to prove the facts to bring the case within this provision.*" (N. Y. Laws, 1866, p. 1836, § 111.)

Sec. 112. The terms of the code of 1848 lacked the concluding phrase, "*transferred in good faith; and upon good consideration before due.*" There was no change in the code of 1851.

Sec. 113. In 1851 this sentence was added, the whole forming § 113 of the code as amended "*A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.*"

OHIO:¹ Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section twenty-seven. (*Co. Civ. Pro.*, § 25.)

In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defence now allowed; but this section shall not apply to negotiable bonds, promissory notes, or bills of exchange, transferred in good faith and upon good consideration, before due. (*Id.*, § 26.)

An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way. (*Id.*, § 27.)

B. *The Present Terms of the Statute.*

NEW YORK: Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A person with whom or in whose name a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section. (*Co. Civ. Pro.*, § 449.)²

Where a claim or demand can be transferred, the transfer thereof passes an interest, which the transferee may enforce by an action or special proceeding, or interpose as a defence or counter-claim, in his own name, as the transferor might have done; subject to any defence or counter-claim, existing against the transferor, before notice of the transfer, or against the transferee. But this section does not apply, where the rights or liabilities of a party to a claim or demand, which is transferred, are regulated by special provision of law; nor does it vary the rights or liabilities of a party to a negotiable instrument, which is transferred. (*Co. Civ. Pro.*, § 1909.)³

MISSOURI: Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in the next section; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract. (*Rev. Stats.*, 1889, § 1990.)

An executor or administrator, trustee of an express trust, or a person expressly authorized by statute, may sue in his own name without joining with him [*as in New York, Co. Pro.*, 1851, § 113]. (*Rev. Stats.*, 1889, § 1991.)

CALIFORNIA: [*As in New York, Co. Pro.* 1849, §§ 111, 112, 113, with this addition to the terms of § 113:] "A person with whom, or in whose name, a contract is made for the benefit of another is a trustee of an express trust within the meaning of this section." (*Co. Civ. Pro.*, §§ 367, 368, 369.)

¹ The intervening codes, those of Missouri, California, Kentucky, Iowa, Minnesota, and Indiana, as first enacted, generally copy the terms of the New York code as given above. When they depart from it, the change is either evidently immaterial, or has had no following.

² This form of the enactment dates from 1877.

³ This form of the enactment dates from 1880.

KENTUCKY: Every action must be prosecuted in the name of the real party in interest, except as is provided in section twenty-one. (*Civ. Co. Prac.*, § 18.)

In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any discount, set-off or defence now allowed; and if the assignment be not authorized by statute the assignor must be a party, as plaintiff or defendant. This section does not apply to bills of exchange, nor to promissory notes placed upon the footing of bills of exchange, nor to common orders or checks. (*Id.*, § 19.)

If the right of the plaintiff be transferred or assigned during the pendency of the action, it may be continued in his name; or the court may allow the person to whom the transfer or assignment is made be substituted in the action, proper orders being made as to security for the costs. (*Id.*, § 20.)

A personal representative, guardian, curator, committee of a person of unsound mind, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, a receiver appointed by a court, the assignee of a bankrupt, or a person expressly authorized by statute to do so, may bring an action without joining with him the person for whose benefit it is prosecuted. (*Id.*, § 21.)

IOWA: Every action must be prosecuted in the name of the real party in interest; but an executor or administrator, a guardian, a trustee of an express trust, a party with whom or in whose name a contract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name, without joining with him the party for whose benefit the action is prosecuted. (*Code*, 1897, § 3459.)

MINNESOTA: [*As in New York, Co. Pro.*, 1851, §§ 111, 112, 113, with a slight change in phraseology.] (*Stats.* 1894, §§ 5156, 5157, 5158.)

INDIANA: [*As in New York, Co. Pro.*, 1851, §§ 111, 113, omitting § 112, and with this addition to § 113:] "It shall not be necessary to make an idiot or lunatic a joint party with his guardian or committee, except as may be required by statute." (*Stats.*, 1894, §§ 251, 252.)

OHIO: An action must be prosecuted in the name of the real party in interest, except as provided in sections forty-nine hundred and ninety-four and forty-nine hundred and ninety-five; but when a party asks that he may recover by virtue of an assignment, the right of set-off, counter-claim, and defence, as allowed by law, shall not be impaired. (*Rev. Stats.*, § 4993.)

The rule prescribed in the preceding section may be so applied, when a person forfeits his bond, or renders his sureties liable, that any person injured thereby, or who is by law entitled to the benefits of the security, may bring an action thereon, in his own name, against the person and his sureties, to recover the amount to which he is entitled by reason of the delinquency, which action may be prosecuted on a certified copy of the bond; and the custodian of the bond shall deliver such copy to any person claiming to be so injured, on tender of the proper fee; but the provisions of this section as to the form of the action shall not be imperative, if provision is otherwise made by law; nor shall a judgment for one delinquency preclude the same or another party from an action on the same instrument for another delinquency. (*Rev. Stats.*, § 4994.)

An executor, administrator, or guardian, a trustee of an express trust, a person with whom or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted; and

officers may sue and be sued in such name as is authorized by law. (*Rev. Stats.*, § 4995.)

OREGON: [*As in New York, Co. Pro.* 1851, §§ 111, 112, 113, with a slight change in phraseology.] (*Hill's Annotated Laws*, 1892, §§ 27, 28, 29.)

WASHINGTON: Every action shall [*and thence as in New York, Co. Pro.* 1849, § 111]. (*Wash. Co. Pro.*, § 134.)

An executor or administrator, a guardian of a minor or person of unsound mind, a trustee of an express trust, or a person authorized by statute, may sue without joining the person for whose benefit the suit is prosecuted. A trustee of an express trust [*and thence as in New York, Co. Pro.* 1851, § 113]. (*Id.*, § 135.)

NEBRASKA: [*As in Ohio, Co. Civ. Pro.*, 1853, §§ 25, 26, 27, with this section, § 5619, in addition between § 26 and § 27 of that act]: "The assignee of a thing in action may maintain an action thereon, in his own name and behalf, without the name of the assignor." (*Neb. Compt'd Stats.*, 1897, §§ 5618, 5619, 5620, 5621.)

WISCONSIN: [*As in New York, Co. Pro.*, 1851, §§ 111, 112, 113.] (*Wis. Stats.*, 1898, §§ 2605, 2606, 2607.)

KANSAS: [*As in New York, Co. Pro.*, 1851, § 111.] (*Kan. Gen. Stats.*, 1897, *Co. Civ. Pro.*, § 20.)

In the case of an assignment [*As in Ohio, Co. Civ. Pro.*, 1853, §§ 26, 27.] (*Id.*, §§ 21, 22.)

NEVADA: Every action shall [*and thence as in New York, Co. Pro.*, 1849, §§ 111, 112, 113.] (*Nev. Gen. Stats.*, 1885, § 3026.)

In the case of an assignment [*as in New York, Co. Pro.*, 1851, §§ 112, 113.] (*Id.*, §§ 3027, 3028.)

NORTH DAKOTA: [*As in New York, Co. Pro.*, 1849, § 111.] (*Rev. Codes*, 1895, § 5221.)

In the case of an assignment [*as in New York, Co. Pro.*, 1851, §§ 112, 113.] (*Id.*, §§ 5222, 5223.)

SOUTH DAKOTA: [*As in New York, Co. Pro.*, 1851, §§ 111, 112, 113, with the addition of the New York amendment of 1866 to § 111.¹] (*Annot'd Stats.*, 1899, §§ 6070, 6071, 6072.)

IDAHO: [*As in New York, Co. Pro.*, §§ 111, 112, 113, with slight verbal changes.] (*Rev. Stats.*, §§ 4090, 4091, 4092.)

MONTANA: [*As in New York, Co. Civ. Pro.*, 1877, § 449.] (*Mont. Co. Civ. Pro.*, § 570.)

In the case of an assignment of a thing in action [*as in New York, Co. Pro.*, 1849, § 112.] (*Id.*, § 571.)

ARIZONA: [*As in New York, Co. Pro.*, 1849, §§ 111, 112.] (*Rev. Stats.*, 1887, §§ 680, 681.)

Suits for the recovery of personal property, debts or damages, and suits for title or for the possession of lands, or for any right attached, or growing out of the same, or for any injury or damage done thereto, may be instituted by executors, administrators or guardians appointed in this territory, in like manner as they could have been by their testator or intestate. (*Id.*, § 678.)

NORTH CAROLINA: [*As in New York, Co. Pro.*, 1851, §§ 111, 112, 113, with this modification of the New York amendment of 1866 to § 111: "But an action may be maintained by a grantee of real estate in his own name, whenever he or

¹ In this addition the South Dakota statute omits the phrase, "or his or her legal representative."

any grantor or other person through whom he may derive title, might maintain such action, notwithstanding the grant of such grantor or other conveyance be void, by reason of the actual possession of a person claiming under a title adverse to that of such grantor, or other person, at the time of the delivery of such grant, or other conveyance." (*Code*, 1883, §§ 177, 179.)

SOUTH CAROLINA: [*As in New York, Co. Pro.*, 1851, §§ 111, 112, 113, with the addition of the amendment of 1866 to § 111.] (*Rev. Stats.*, 1893, §§ 132, 133, 134.)

ARKANSAS: Every action must be prosecuted in the name of the real party in interest, except as provided in sections 5625, 5626 and 5628. (*Dig. Stats.*, 1894, § 5623.)

Where the assignment of a thing in action is not authorized by statute, the assignor must be a party, as plaintiff or defendant. (*Id.*, § 5624.)

Where the right of the plaintiff is transferred or assigned during the pendency of the action, it may be continued in his name, or the court may allow the person to whom the transfer or assignment is made to be substituted in the action, proper orders being made as to security for the costs. (*Id.*, § 5625.)

An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or the State, or any officer thereof, or any person expressly authorized by the statute to do so, may bring an action without joining with him the person for whose benefit it is prosecuted. (*Id.*, § 5626.)

WYOMING: [*As in Ohio, Rev. Stats.*, §§ 4993, 4994, 4995, with this addition to the terms of § 4994]: "A county may sue in its corporate name upon any official bond of any of its officers." (*Wyo. Rev. Stats.*, 1887, §§ 2382, 2383, 2384.)

UTAH: Every action must [*as in New York, present form, Co. Civ. Pro.* § 449]. (*Rev. Stats.*, 1898, § 2902.)

In the case of an assignment of a thing in action, the action by the assignee is without prejudice [*and thence as in New York, Co. Pro.*, 1849, § 112]. (*Id.*, § 2903.)

COLORADO: Every action shall [*and thence as in New York, Co. Pro.*, 1849, §§ 111, 112]. (*Colo. Co. Civ. Pro.*, §§ 3, 4.)

An executor or administrator, or trustee of an express trust [*and thence as in New York, Co. Pro.*, 1851, § 113]. (*Id.*, § 5.)

CONNECTICUT: An executor, administrator, or trustee of an express trust may sue or be sued, without joining the persons represented by him and beneficially interested in the suit. (*Conn. Gen. Stats.*, 1888, § 886.)

OKLAHOMA: [*As in New York, Co. Pro.*, 1851, § 111]. (*Stats.*, 1893, § 3898.)

In the case of an assignment [*as in Ohio, Co. Civ. Pro.* 1853, §§ 26, 27.]. (*Id.*, §§ 3899, 3900.)

NEW MEXICO: Every action shall [*as in New York, Co. Pro.*, 1849, §§ 111, 113, § 112 omitted]. (*Compl'd. Laws*, 1897, sub-secs. 2 and 3, § 2685.)

SECTION II. THE OPERATION OF THE STATUTE.

NOTE.

For the most part, the question, in any given case, Who is the real party in interest? finds its answer in substantive law, rather than in procedure; for the conditions and limitations which meet the pleader here are, in the general run of cases, just those conditions and limitations which attach to the primary right. But there are, nevertheless, many cases where the question stands in a special relation to the law of procedure. These cases group themselves under the following heads:

A. The nature, in general, of the interest required to make one a "real party in interest" within the meaning of the codes.

B. The real party in interest when a contract is made with one for the benefit of another.

1. When the party with whom the contract is made is the agent of an undisclosed principal.
2. When the party with whom the contract is made contracts ostensibly for the benefit of a third person, stranger to the contract.

C. The real party in interest when a chose in action is assigned.

1. When the assignee has the full legal title, but is without any beneficial interest.
2. When the assignee has the beneficial interest, but is without the legal title.

D. The real party in interest under special statutory relations.

E. When the action may be brought in the name of one who is not a real party in interest.

1. The trustee of an express trust.
2. Other instances.

A. The nature, in general, of the interest required to make one "a real party in interest" within the meaning of the codes.

DENNISON *v.* SOPER.

SUPREME COURT OF IOWA, DECEMBER TERM, 1871.

[33 Iowa, 183.]

Plaintiff alleges, in his petition, that on the 22nd day of October, 1869, he executed a joint and several promissory note with the defendants, of which the following is a copy:

\$1,000. "One year after date we promise to pay to the order of John Bell & Co., \$1,000 with ten per cent. interest, payable at Center Point. Value received. { U. S. Stamp. } { 50 Cents. }	CENTER POINT, October 22, 1869. C. SOPER. E. W. STEWART. B. W. HILLIARD. JONATHAN DENNISON.
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"Renewed December 21, 1870.

R. D. STEPHENS.

Plaintiff further alleges that he believes the note is in the possession of the payees; that he signed the note as surety only; that the same has not been paid; that the plaintiff has not been indemnified or secured against loss by payment thereof by him. It is further alleged that the defendants (the other makers of the note) "have disposed of their property in part, with intent to defraud their creditors, and are now attempting to and are about to dispose of the balance of their property with intent to defraud their creditors, and that the plaintiff is in imminent danger of being left to pay said note; and by the said fraudulent acts of defendants entirely lose said amount; and, further, that if he is delayed until he can procure said note from the payees, said defendants will have their property fraudulently disposed of and beyond the reach of legal process.

The action was commenced on the 2nd day of March, 1870, more than seven months before the maturity of the note, the petition alleging that "nothing but time is wanting to fix an absolute indebtedness." The petition asked a writ of attachment against the property of the defendants, and that plaintiff have judgment for the amount of the note with interest and costs.

The material averments of the petition are all denied by the answer.

The cause was tried by the court upon the following evidence, viz.: The original note with a renewal written across the face; an indorsement in blank by John Bell & Co.; an indorsement by R. E. Graves, president of First National Bank of Dubuque, Iowa, to R. D. Stephens

for collection, and the testimony of the plaintiff as follows: "I signed the note in evidence as security only. I have not been in any manner secured or indemnified for signing said note. I paid said note about the first of January, 1871, and have received nothing for such payment." Thereupon the court rendered judgment for plaintiff for the amount of the note with interest and costs, to which defendants excepted and appeal.

I. M. Preston & Son, for the appellants.

Thompson & Davis, for the appellee.

MILLER, J.—From the record it appears that the plaintiff was a joint maker, with defendants, of the note upon which the action is based. As between plaintiff and defendants, he was surety only. He does not claim to own or have any property in the note, but bases his right of action against his co-makers solely upon the facts that he was only a surety for them; that he was not indemnified against loss in case he paid the note; that the defendants have disposed of part of their property with intent to defraud their creditors, and are about to dispose of the balance with like intent; and that after the action was brought and before judgment, he paid the note.

We are unable to discover upon what principle the action is maintainable. The statute requires that "every action must be prosecuted in the name of the real party in interest," except in certain specified cases.¹

The "real party in interest" is the party having the beneficial interest; the party having the beneficial ownership, in this case, the holder of the note for value.²

The plaintiff had not, nor did he claim to have, any interest in the note. The exceptions to the above rule are specified in section 2758 of the Revision as follows: "An executor or an administrator, a guardian, a trustee of an express trust, a party with whom or in whose name a contract is made for the benefit of another, or a party expressly authorized by statute, may sue in his own name, without joining with him the party for whose benefit the suit is prosecuted."

Now it is clearly manifest that the plaintiff occupied neither of the relations enumerated in the above provision. He was neither the real party in interest nor the trustee, agent, or other representative of the real party. In some one or other of these capacities he must sue, if at all. He must have either the legal title or the beneficial interest to entitle him to sue on the note. (*Cottle v. Cole & Cole*, 20 Iowa, 485.)

A surety has no right of action against his principal, in respect to the debt for which he is surety, until he has paid such debt for his principal. *Walker v. Lathrop*, 6 Iowa, 516. Then, and not until then, does the surety have a cause of action against the principal. Chapter

¹ Revision of 1860, § 2757.

² Citing *Conyngham v. Smith*, 16 Iowa, 471; *Cottle v. Cole & Cole*, 20 id., 485; *Rice v. Savery*, 22 id., 470.

75 of the Revision of 1860 provides a remedy for the benefit of sureties where they apprehend that the principal is about to become insolvent, etc., "*and a right of action has accrued on the contract*," but we have no statutory provision affording such remedy before any right of action has accrued. And, with a single exception in the statute, the real party in interest, or the party having the legal title to a chose in action, can not do so until the maturity of his claim or cause of action. *Whitney et al. v. Bird et al.*, 11 Iowa, 407. So that the lawful holders of the note in this case could not have maintained an action at the time this suit was brought, except for the purpose of availing themselves of the benefit of the provisional remedy of attachment, as provided in section 3178 of the Revision, and this section restricts the cases to those where "*nothing but time is wanting to fix an absolute indebtedness*." In the case before us, there was no indebtedness whatever existing between the plaintiff and the defendants. The plaintiff held no claim against defendants on the note which time would mature or render absolute. The claim itself only came into being when the plaintiff paid the note, which was after suit brought. Whether there ever would become an indebtedness at all depended upon this contingency. There was no previous indebtedness which time *alone* would render absolute. The subsequent *act of payment* by plaintiff was necessary, not only to render the claim absolute, but to *create* an indebtedness.

We are therefore of the opinion that the action, at the time it was brought, was not maintainable in the name of the plaintiff, though it might have been in the names of the holders of the note; and the payment of the note by plaintiff ten months after the suit was commenced did not entitle him to judgment. *Reversed.*

THOMPSON v. FARGO.

COURT OF APPEALS OF NEW YORK, APRIL 16, 1872.

[49 N. Y. 188.]

Appeal from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of plaintiff entered upon the report of a referee.¹

This action was brought to recover damages for an alleged failure of defendant to deliver a package of United States Treasury notes received by it for transportation.

Facts found by the referee: That the defendant, the American Express Company, is a joint-stock company, consisting of more than seven members, and is engaged in the express business as common carriers, whose principal office is in the city of New York.

¹ Reported below, 58 Barb., 575; 44 How. Pr., 176.

On or about the 11th day of August, 1865, the American Express Company received from the United States Express Company, at Decatur, in the State of Indiana, a package, containing U. S. compound interest notes and 7.30 treasury notes to the amount of \$660.63, together with the papers discharging John and William White from service in the army of the United States.

The said package was addressed as follows: "By the United States Express Company, \$660.63, John and William White, care Captain James K. Martin, Bunton House, Terre Haute, Indiana."

The package was delivered to the United States Express Company by plaintiff at Springfield, Ill., and a receipt taken.

The American Express Company conveyed it to the place of destination without delay. Diligent search and inquiry were made for the consignees, but they could not be found or heard from.

The contents of the package was the back pay of the said John and William White, as soldiers in the army of the United States, and their discharge papers from the service, and a letter from the plaintiff.

The Whites had employed the plaintiff as their agent to collect for them the back pay in question from the United States government.

The enclosure in the package was the proceeds of a check received by plaintiff from the government agent at Springfield, Ill., for such back pay.

The plaintiff demanded the package in question from James C. Fargo, the treasurer of the defendant, at the city of New York, who refused to deliver the same to him.

Hooper C. Van Vorst, for the appellant.

Isaac Edwards, for the respondent.¹

PECKHAM, J.—To sustain an action against a common carrier for failing to deliver goods, the plaintiff must be the owner, or have some special interest in them.² *Prima facie*, the consignee is the owner.

If this had been a sale of goods by the consignor, ordered by the consignee, without stating in what way or manner to send them, but only where, the consignor would have had sufficient title to maintain the action—because the title in such case, as a general rule, would not pass by the mere delivery to the carrier. In this case, however, the plaintiff never owned the money ordered to be sent to the consignee, and had no special interest in it. He was a mere agent. Hence if he simply fulfilled the orders of the owners and sent the money to the consignee by a suitable and proper conveyance, his duties and liabilities were discharged. He then had no further right or interest in the matter.

The action was brought and tried upon the assumption that the plaintiff properly collected and sent the money due from the government to the Whites. There was no allegation or suggestion that he

¹ The arguments are omitted.

² *Citing* *Krulder v. Ellison*, 47 N. Y., 36; *Green v. Clarke*, 12 N. Y., 343

had not sent the money he received by the usual and proper mode, that he had not fulfilled the directions of the Whites, that he was not authorized by them to do precisely what he did—the referee has substantially so found as a matter of fact, and there is no exception to any of his findings of fact. It is too late here for the plaintiff to attempt to vary these findings of fact to sustain his judgment.

It is the right and interest of this defendant to see that the package is delivered to none but the true owner. A wrongful recovery against this defendant will afford it no defence as against the true owner or their representatives.

This is not a case of a fictitious consignee. The Whites were alive and in the civil war. This was their pay, and if they have died since this proceeding, that gives no right to this plaintiff to sue upon these facts. It follows that the referee erred in finding for the plaintiff, and the judgment for the General Term affirming that judgment must be set aside and a new trial granted, costs to abide event.

All concur, except ALLEN, J., not sitting, and RAPALLO, J., not voting.

*Judgment reversed.*¹

ALBANY AND RENSSELAER COMPANY v. LUNDBERG.

SUPREME COURT OF THE UNITED STATES, APRIL 25, 1887.

[121 U. S. 451.]

This was an action at law on a contract. Verdict for the plaintiff, and judgment on the verdict. The defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. Edwin Countryman, for plaintiff in error.

Mr. Everett P. Wheeler, for defendant in error.

MR. JUSTICE GRAY delivered the opinion of the court.

This action was brought by Gustaf Lundberg, an alien and a subject of the Kingdom of Sweden and Norway, residing at Boston in the State of Massachusetts, against the Albany and Rensselaer Iron and Steel Company, a corporation of the State of New York, upon two contracts for the sale and purchase of Swedish pig iron, the first of which was as follows:

"N. M. HOGLUND'S SONS & CO., STOCKHOLM;

"Gustaf Lundberg, Successor to Nils Mitander:

"38 KILBY STREET, BOSTON, February 10, 1880.

"I, Gustaf Lundberg, agent for N. M. Hoglund's Sons & Co. of Stockholm, agree to sell, and we, Albany and Rensselaer Iron and Steel Co., Troy, N. Y., agree to buy the following Swedish charcoal grey pig iron, viz.: 500 tons of brand NBGPH, at a price of forty-eight (\$48) dollars, American gold, per ton of 2240 lbs., delivered on wharf at New York, duty paid; said iron to be in accordance

¹ See also *Thompson v. Faigo* (1875), 63 N. Y., 479.

with an analysis furnished in Gustaf Lundberg's letter of 6th February. Payment in gold in Boston or New York funds within 30 days from date of ship's entry at custom-house. Shipment from Sweden during the season, say May next or sooner if possible. The above quantity hereby contracted for to be subject to such reduction as may be necessitated by natural obstacles and unavoidable accidents. The seller not accountable for accidents or delays at sea. Signed in duplicate.

"Accepted, GUSTAF LUNDBERG.

"Accepted, ALBANY & RENSSELAER IRON & STEEL CO."

The other contract differed only in being for the sale and purchase of "300 tons of brands SBVE and NBBBK."

The analysis referred to in both contracts showed, in the first brand .03, and in the two other brands .024, of one per cent of phosphorous.

The above amount of iron was made in Sweden, that of the first brand of the Pershytte furnace of the Ramshyttan Iron Works, out of ore from the Pershytte mines, and that of the two other brands at the Svana Iron Works; was brought and shipped from Stockholm by N. M. Hoglund's Sons & Co. in May, 1880; arrived at New York, in June, 1880, and was thence taken to the defendant's works at Troy. An analysis there made by the defendant's chemist showed in the three brands respectively .047, .042, and .049, of one per cent of phosphorous. The defendant therefore refused to take the iron, and returned it to the plaintiff, who afterwards sold it for less than the contract price, brought this action to recover the difference, and obtained a verdict and judgment for upwards of \$15,000. The defendant sued out this writ of error.

The first question presented by the bill of exceptions is, whether this action can be maintained in the name of Lundberg, or should have been brought in the name of his principals, N. M. Hoglund's Sons & Co.

The paper upon which each of the contracts in suit is written has at its head, besides the name of that firm, the name of "Gustaf Lundberg, successor to Nils Mitander," followed by the street and number of his office in Boston. The contract itself begins with a promise by him in the first person singular, "I, Gustaf Lundberg, agent for N. M. Hoglund's Sons & Co., agree to sell;" the description added to his name in this clause is the only mention of or reference to that firm in the contract; his promise is not expressed to be made by them as their agent, or in their behalf; and the agreement is signed by him with his own name merely.

There are strong authorities for holding that a contract in such form as this is the personal contract of the agent, upon which he may sue, as well as be sued, in his own name, at common law.¹

In *Gadd v. Houghton*, 1 Ex. D. 357, the contract which was held not to bind the agent personally was expressed to be made "on account of

¹ *Citing Kennedy v. Gouveia*, 3 D. & R. 503; *Parker v. Winlow*, 7 E. & B. 942; *Dutton v. Marsh*, L. R. 6 Q. B. 361; *Buffum v. Chadwick*, 8 Mass. 103; *Packard v. Nye*, 2 Met. 47.

the principals;" and in *Oehlrichs v. Ford*, 23 How. 49, in which the contract, which was held to bind the principal, more nearly resembled that before us than in any other case in this court, the important element of a signature of the agent's name, without addition, was wanting.

But it is unnecessary to express a definite opinion upon the question in whose name, independently of any statute regulating the subject, this action should have been brought.

The Code of Civil Procedure, of the State of New York, contains the following provision:

"Sec. 449. Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom, or in whose name a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section."

Under this provision, the Court of Appeals of that State has held that an agent of a corporation to whom, "as executive agent of the company," a promise is made to pay money is "a person with whom, or in whose name, a contract is made for the benefit of another," and may therefore sue in his own name on the promise.¹ The rule thus established is applicable to actions at law in the courts of the United States held within the State of New York.²

The case then stands thus: If the agreement to sell is an agreement made by Lundberg personally, and not in his capacity of agent of the Swedish firm, the price is likewise payable to him personally, and the action on the contract must be brought in his name, even at common law. If, on the other hand, the agreement must be considered as made by Lundberg, not in his individual capacity, but only as agent and in behalf of the Swedish firm, and for their benefit, then the price is payable to him as their agent, and for their benefit, in the same sense in which an express promise to pay money to him as the agent of that firm would be a promise to pay him for their benefit, and therefore, by the law of New York, which governs this case, an action may be brought in his name. In either view, this action is rightly brought.³

¹ Citing *Considerant v. Brisbane*, 22 N. Y. 389. See *infra*, "Trustee of an Express Trust."

² Citing Rev. Stat., § 914; *Sawin v. Kenny*, 93 U. S. 289; *Weed Sewing Machine Co. v. Wicks*, 3 Dillon, 261; *United States v. Tracy*, 8 Benedict, 1. See *infra*, Practice Conformity Act.

³ Part of the opinion, on questions of evidence, is omitted.

The judgment below was, however, reversed, and the case remanded to the Circuit Court, with directions to set aside the verdict, because of the admission of incompetent evidence tending to mislead the jury.

CASSIDY v. WOODWARD.

SUPREME COURT OF IOWA, MAY 13, 1889.

[77 Iowa, 354.]

This is an action in equity, and it involves the title and ownership of eighty acres of land in Sioux county.

Upon a trial on the merits, the plaintiff's petition was dismissed, and a decree was entered quieting the title in the defendant. Plaintiff appeals.

Rickel & Crocker and *J. W. Bull*, for appellant.

Argo & McDuffie and *Struble, Rishel & Hart*, for appellee.

ROTHROCK, J.—I. Both parties claim title to the land under one Gabriel T. Rock. The plaintiff's alleged title consists of a regular chain of conveyances from Rock through several intermediate grantors. The defendant's alleged title is based upon a sheriff's sale of the land upon an execution on a judgment against said Rock. . . .

II. It is claimed in the answer, and strenuously urged by counsel for appellee, that the plaintiff is not the real party in interest; that the real parties are the counsel in the case; and that they bought the land and took the title in the name of the plaintiff, who is a servant in the family of one of the counsel; and that the purchase of the land was a fraud and a conspiracy on the part of plaintiff's counsel; and that the claim made by plaintiff for the land is against public policy and good morals.

It is true that the plaintiff's counsel purchased the land and paid for it and had the conveyance made to plaintiff, a servant in one of their families. There is no evidence that they discovered the alleged defect in the plaintiff's title. On the contrary it appears that Rock conveyed the land to one Marbourg, and he conveyed it to one Pitts, and Pitts conveyed it to the plaintiff. It is true, as claimed by the defendant, that actions must be prosecuted in the name of the real party in interest, excepting in certain cases. Code, sec. 2543. The exceptions are set forth in section 2544, which is in these words: "An executor or administrator, a guardian, a trustee of an express trust, a party with whom, or in whose name, a contract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name, without joining with him the party for whose benefit the suit is prosecuted."

It has uniformly been held by this court that, under this provision of the Code, the party holding the legal title to a cause of action, though he be a mere agent or trustee, with no beneficial interest therein, may sue thereon in his own name.¹

¹ Citing *Cottle v. Cole*, 20 Iowa, 481; *Rice v. Savery*, 22 Iowa, 470; *Pearson v. Cummings*, 28 Iowa, 344; *Knadler v. Sharp*, 36 Iowa, 232; *Vimont v. Railway Co.*, 64 Iowa, 514.

Accord: *Alexander v. Overton* (1893), 36 Neb, 503. And see, *Gray v. Journal of Finance* (1893), 2 Misc. 260.—Ed.

The plaintiff stands in the place of Marbourg, who was grantee of Rock, and of Pitts, her grantor; and the fact that she paid nothing for the conveyance, and that her counsel paid the consideration and had the conveyance made to her, even without her knowledge at the time, is no defence to the action.¹

Reversed.

WELSH *v.* RHEINHARDT & CO.

SUPREME COURT OF NEW YORK, APPELLATE TERM, JULY, 1897.

[21 Misc. 22.]

Appeal from an affirmance by the General Term of the City Court of a judgment in favor of plaintiff.

Joseph C. Rosenbaum, for appellant.

Franklin Pierce, for respondent.

DALY, P. J.—The plaintiff made an agreement in writing with the defendant, a corporation, to furnish and erect a gas engine complete for \$1,085, the price to include a suitable brick foundation for the engine and all necessary gas, water, and exhaust piping, and plaintiff guaranteed the engine for one year against all imperfections of workmanship and material and also guaranteed the horsepower, agreeing to furnish, if needed, an additional engine. The contract also included the following clause, upon which defendant bases the defence that the plaintiff is not the real party in interest, that being the sole contention upon this appeal.

"It is also herein agreed and understood that the above thirty-power engine is to remain the property of the Springfield Gas Engine Co., of Springfield, Ohio, until paid for in full, and is not to be sold, mortgaged, or removed without their entire approval and consent."

This action is brought to recover the contract price above specified, and it is claimed that the Springfield Gas Engine Co. alone has the right to maintain the action as owner of the engine.

The real party in interest is the party having the sole right to enforce the contract, and the plaintiff is that party, the contract being not simply for the sale of the engine, for which plaintiff might have been regarded as acting merely as agent, but for labor and materials for which he contracted as principal, and for collateral warranty upon which he alone is liable. If plaintiff had made the contract expressly as agent of the Springfield company, he would nevertheless be entitled to sue in his own name upon it, since he was personally bound for its fulfilment. *Nelson v. Nixon*, 13 Abb. Pr. 104. So far as any title was vested in the Springfield company by the contract, that title depended upon the contract as a mere incident thereto and would be divested by

¹ Part of the opinion, dealing with other points, is omitted.

payment as prescribed therein. If the contract with the plaintiff be satisfied no title remains in the company. None of the cases cited by appellant sustains his objection to plaintiff's recovery.

BISCHOFF and MCADAM, JJ., concur.

Judgment affirmed, with costs.

ALEXANDER v. OVERTON ET AL.

SUPREME COURT OF NEBRASKA, SEPTEMBER 22, 1897.

[52 Neb. 283.]

This action was brought in the District Court of Otoe county under the title of Art Eliza Alexander against John Overton and others. The facts appear in the opinion of the court.

C. W. Seymour, for plaintiff in error.

John C. Watson and John W. Dixon, contra.

NORVAL, J.—This is the second appearance of this cause in this court.¹ The action was brought under section 71, chapter 66, General Statutes, 1873, against the principal and sureties on the official bond of John Overton, as treasurer of Otoe county, to recover for the wrongful sale by him to plaintiff of certain real estate for taxes.²

The sole defence relied upon is that plaintiff is not the real party in interest.

On the last as well as on the first trial in the court below this issue was determined in favor of the defendants. On the former hearing in this court a reversal of the judgment was entered for want of sufficient evidence to sustain the said defence. In the opinion then filed it was held that plaintiff could maintain it, since it was proven that the lands were purchased from defendant Overton at tax sale in the name of plaintiff with moneys purporting to belong to her. On the last trial it was likewise established by undisputed testimony that the lands in controversy were purchased for plaintiff by her brother, W. D. Merriam; that he paid the money for her on the several sales to the defendant Overton, and that the latter made the certificate of tax deeds to plaintiff. These facts justified the bringing of the suit in her name when the same was instituted, no assignment of the causes of action at or prior to that time having been shown.

¹ See Alexander v. Overton (1893), 36 Neb. 503.

² In other words, for selling lands where no title could pass by the sale. Section 71, chap. 66, Gen. Stat., N. B., 1873, provided that "When, by mistake, or wrongful act of the treasurer, or other officer, land has been sold contrary to the provisions of this act, the county is to save the purchaser harmless by paying him the amount of principal and interest to which he would have been entitled had the land been rightfully sold, and the treasurer, or other officer, and their sureties, shall be liable for the amount on their bonds to the county, or the purchaser may recover the amount, directly from the treasurer, or other officer, making such mistake or error."—Ed.

John A. Rooney, an attorney at law, in the office of John C. Watson, counsel for defendant, testified on the second trial that on his return from a business trip east, at the request of Mr. Watson he called upon plaintiff at her home in Sigourney, Iowa, and had a conversation with her, in which she stated she was a sister of W. D. Merriam; that she was not interested in any suits pending in the district court of Otoe county under the title of Art Eliza Alexander against John Overton; and that she possessed no money of her own. This testimony was wholly insufficient to defeat the action, and is easily reconciled with the evidence adduced on behalf of the plaintiff. W. D. Merriam testified, and his testimony is uncontradicted, that he bought the lots at tax sale from Mr. Overton for plaintiff, Mrs. Alexander, with her money and in her name; that he had no interest in the purchases; and that in January, 1894, since the commencement of this action and prior to said conversation which Mr. Rooney had with plaintiff, Mr. Merriam purchased all his sister's interest in this suit. The assignment was introduced in evidence, and is found in the bill of exceptions. While Mrs. Alexander did not in fact have any interest in the litigation at the time she conversed with Mr. Rooney, she was the real party in interest at the time the suit was brought. The assignment by plaintiff to Mr. Merriam did not abate the action, but the latter, under section 45 of the Code, had the undoubted right to prosecute the suit to final termination in the name of the original plaintiff.¹

Under the evidence the court should have directed a verdict for the plaintiff. The judgment is reversed and the case remanded for a new trial.

Reversed and remanded.

HARRISON, J., not sitting.

EGGELING *v.* ALLEN.

SUPREME COURT OF NEW YORK, APPELLATE TERM,
DECEMBER 13, 1898.

[25 Misc. 496.*]

GILDERSLEEVE, J. — The plaintiff recovered judgment against the defendant upon a trial before the court and jury. The defendant is an attorney at law, and the action was for a conversion of money collected by defendant for plaintiff in another action. This action was com-

¹ Citing *Mageman v. Bell*, 13 Neb., 247; *Temple v. Smith*, 13 Neb., 513; *Dodge v. Omaha & S. W. R. Co.*, 20 Neb., 276; *Howell v. Alma Milling Co.*, 36 Neb., 80.

In Section 45 of the Nebraska Code it was provided that "in case of the death or other disability of a party, the Court may allow the action to continue by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party, or the Court may allow the person to whom the transfer is to be substituted in the action."—*Ed.*

* S. C., 54 N. Y. Supp. 1029.

menced on April 14, 1898, and tried on May 18th. Subsequent to the transaction in which defendant collected the money in question, and before the commencement of this action, plaintiff became insolvent, and this money, so collected by defendant for plaintiff, was discovered in supplementary proceedings. The court thereupon appointed a receiver of the property of the plaintiff herein, and restrained the said plaintiff and all persons, except the receiver, from interfering with said money. The order appointing the receiver was filed and recorded on February 15, 1898, and the receiver duly qualified.

At the opening of the trial herein, the defendant's attorney stated to the court that the defendant had been served with an order appointing a receiver for the moneys claimed in the action, and that the order enjoined both plaintiff and defendant from any interference with or transfer of the money; and said attorney added, "I submit this certified copy of the order to the court." He then moved that, for that reason, the case be dismissed. The court denied the motion, and directed the trial to proceed, saying, "If judgment is rendered against you (defendant), you can turn the money over to the receiver." We think this ruling was error. The order appointing a receiver, though annexed to the return, does not seem to have been marked in evidence. It was, however, treated by the court as properly in evidence, its effect was commented upon by the learned justice, and we must regard it as a part of the record that we are reviewing.

It, therefore, clearly appears that the plaintiff was not the real party in interest, and was without power to prosecute the action.

The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

L. L. G. Benedict, for appellant.

H. M. Greene, for respondent.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

BEEKMAN, P. J., and GIEGERICH, J., concur.

B. *The real party in interest when a contract is made with one for the benefit of another.*

I. WHEN THE PARTY WITH WHOM THE CONTRACT IS MADE IS THE AGENT OF AN UNDISCLOSED PRINCIPAL.

ERICKSON *v.* COMPTON.

SUPREME COURT OF NEW YORK, CAYUGA GENERAL TERM, JUNE, 1852.

[6 *How Pr.* 471.]

This was an action upon a contract, a copy of which is hereinafter given. The plaintiff alleged in his complaint that he, by James H. Hotchkin, Jr., his agent, entered into a contract with the defendant, setting forth the substance of it in like manner as if it had been made with himself in person, and assigning several breaches. The defendant in his answer denied that he made a contract with the plaintiff in person or by his agent, but stated that he made a contract with James H. Hotchkin, Jr., of which contract duplicates were made; that one of these, signed by Hotchkin, was delivered to the defendant, and the other, signed by the defendant, was delivered to Hotchkin; and that Hotchkin at the time delivered to the defendant his check on the Steuben County Bank for the \$500 mentioned in the contract. A copy of the contract, retained by the defendant, was set out in the answer, as follows:

Rec'd of James H. Hotchkin, Jr., his check for \$500, on Steuben County Bank, payable on Monday next, to be applied on the last invoice of the following contract, viz.: I agree to sell him all the pulled wool I now have on hand here and in New York, that is unsold, and what is on the skins I have now bought up to this time; also to include all the green skins which may come in or be taken off by me up to the first day of June next, excepting qualities below No. 2, and to get up the wool in dry order, and in order as to condition and quality, equal to what I now have on hand here, and making the wool now in the hands of B. Marshman, 39 Spruce street, New York, the sample of its condition, all to be taken off by the first day of June next, and to keep pulling on this contract until all is pulled; and the amount, not exceeding 60,000 lbs., and deliver the same to J. Fowler's landing on Seneca Lake at 26½ cents per lb.; said Hotchkin to furnish the sacks and pay for the wool on each invoice, to average every fifteen days, at my counting-room, Tyrone; the sacks to be their actual tare; sacks to be good and delivered in time, else Compton to furnish them at 5c. each.

J. H. HOTCHKIN, JR.

Tyrone, 30th January, 1849.

The defendant alleged that he made the contract with Hotchkin as principal and not as agent; that it was made for the benefit of Hotchkin; and that plaintiff had no interest in the same. He also answered as to the breaches assigned.

The plaintiff replied that the contract set forth in the complaint, and also set forth and referred to in the answer, was made with the defendant by Hotchkin as the agent of and for the plaintiff, of which the defendant had notice; that the money advanced by Hotchkin was the money of the plaintiff; and that the plaintiff was the sole and only party interested in the contract as purchaser. Issue was taken upon other matters in the answer.

The cause was brought to trial at a Circuit Court in Steuben county in November, 1850, when the duplicate contract, signed by the defendant, was produced and proved by Hotchkin, and read in evidence.

The plaintiff's counsel then proposed to the witness, "In what capacity were you acting at the time of the execution of the contract?" This question was objected to by the defendant's counsel and the objection was sustained by the court and the question excluded. To this decision the counsel for the plaintiff excepted.

The plaintiff's counsel then offered to prove that at the time the contract was made the witness was acting as the agent of the plaintiff; that the witness had no interest in the contract, or the subject matter of it; but that it belonged solely and exclusively to the plaintiff who had furnished the \$500 advanced at the time of the execution of the contract; and that the defendant before and at the time the contract was executed knew these facts. The defendant's counsel objected to this evidence and the court decided that the testimony was inadmissible and excluded it. To this decision the counsel for the plaintiff excepted.

The plaintiff having no further evidence to offer, the court directed a non-suit.

Judgment having been entered against the plaintiff, he appealed to the general term.

O. H. Palmer, for plaintiff.

D. G. Sunderlin, for defendant.

By the Court, T. R. STRONG, JUSTICE.—It appears to be a well-established rule in England that a principal whose agent has entered into a simple contract in writing in the business of the agency in the agent's name, whether the agency was or was not disclosed at the time, may prove by parol the fact of such agency and maintain an action on the contract in his own name. Such proof it is there held does not contradict the contract; "it merely lets in a third party who was really interested." The cases in support of this doctrine are collected in *Story on Agency*, §§ 160, 163, 269, 270, and notes; see also *Humble v. Hunter*, 12 Adolphus & Ellis, 310; *Schmalz v. Avery*, 3 Eng. Law and Ed. Rep. 391, 395. Indeed the English rule goes further and holds the principal bound by and liable upon such a contract in like manner as if he had signed it (same cases). I am inclined to think, however, that the common law rule on the subject in this state is the other way; it

certainly is as respects the liability of the principal on the contract.¹ Hence, if the question in the present case as to the admissibility of the evidence offered at the circuit was to be decided upon common law principles, I should feel bound by the authorities to sustain the decision excluding it.

But I am satisfied that, under the provisions of the Code, the evidence offered in this case was admissible; and that assuming to be true, what was proposed to be proved, the action was well brought in the name of the plaintiff. Section 111 of the Code provides that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 113," &c. By section 113, "an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." It was not necessary for the plaintiff, as it would have been before the Code, to show that the contract was made with him, to entitle him to sue upon it, but it would have been sufficient to prove that he was the sole owner of the contract by its having been made for his benefit.

The difficulty in such a case at common law was well stated by JAW-ERT, Justice, in *Newcomb v. Clark*,² before cited. That was an action by the principal on a written guaranty made to his agent. He says: "The rule in regard to parties to actions seems to be, that every action on an express contract must be brought in the name of the person to whom the engagement violated was originally made, unless it is transferrable, as a negotiable note, &c. In the present case the promise or agreement is expressly made with Peters; Clark's name does not appear in the writing. It was not competent to contradict or amend the agreement, by parol proof, by substituting Clark's name as the promisee in place of Peters." According to this doctrine an action would not lie in the name of the principal, unless he was an original party to the agreement. The English cases hold that he might be proved to have been such by parol, but the cases in this State appear to decide that the contract could not be thus amended by adding a party.

The Code, by the sections named, has abolished the common-law rule in regard to parties, in such a case, so far as it was imperative, and conferred upon the exclusive owner of the demand the right to sue in his own name, or in the name of the agent, at his election. That rule being abolished, the plaintiff was not required, in order to maintain the present action, to amend the agreement in question by substitut-

¹ Citing *Newcomb v. Clark*, 1 Denio, 226, 229; *Harp v. Osgood*, 2 Hill, 216, 219; *Minard v. Mead*, 7 Wend. 68; *Pentz v. Stanton*, 10 Wend. 271; *Spencer v. Field*, *id.* 87; *Allen v. Colt*, 6 Hill, 318; *Evans v. Wells*, 22 Wend. 324; *Townsend v. Hubbard*, 4 Hill, 351; *Moss v. Livingston*, 4 Comst. 208.

² 1 Denio, 226, 229 (1845).

ing or adding the plaintiff's name. The agreement need not have been made by, or with him, as an original party. It might be treated as having been made with Hotchkin. If the plaintiff had the entire title to the claim, it was all that was important. Nor would the parol proof offered have contradicted the contract, regarding it as made with Hotchkin. It would, on the contrary, have been in perfect harmony with it. There is no inconsistency between a contract in the name of one person, and the fact that another person is entitled to the benefit of it. It will thus be seen, I think, that the obstacle which existed at common law to the plaintiff's bringing the action and making the proof offered in this case, has been entirely removed.

In view of the case now taken, it would have been more proper for the plaintiff to have set forth the contract in his complaint, as made with Hotchkin, and alleged that it was made by him as agent of the plaintiff, and for the plaintiff's benefit; and I should entertain doubts as to the right of plaintiff to recover upon the complaint as framed, but for the fact that the defendant has himself set out the contract fully in his answer, and the plaintiff has adopted it in his reply as the one referred to in the complaint. This, I think, obviates the objection now suggested.

It follows that the evidence which was rejected should have been received. A new trial is therefore granted, costs to abide the event.¹

HALL v. PLAINE.

SUPREME COURT OF OHIO, DECEMBER TERM, 1863.

[14 O. S. 417.]

In October, 1857, Samuel Plaine brought a civil action against Henry Ebbert and others, in the common pleas of Seneca county, on certain promissory notes. In this action Luther A. Hall, in March, 1858, was made a defendant, and filed his answer in the nature of a bar and counterclaim.

Such proceedings were had in the action, that in June, 1860, plaintiff had leave to dismiss his action and withdraw his petition, without prejudice to a future action; but, on the motion of Hall, the court at the time, ordered his counterclaim to be docketed, and set down for trial pursuant to the code. Hall had leave to amend, and made Ebbert also a party, and on November 5, 1860, filed his amended answer and cross petition, which alleges in substance, as a first cause of action, that Ebbert, on February 24, 1854, purchased of Plaine, in his (Ebbert's) name,

¹ Accord: *Ruiz v. Norton* (1854), 4 Cal., 355, 358; *Ames v. First Division St. Paul R. R.* (1867), 12 Minn., 412; *Darling v. Noyes* (1871), 32 Iowa, 96; *Briggs v. Munchon* (1874), 56 Mo., 466, 472; *Bank of Odessa v. Jennings* (1885), 18 Mo. App., 651, 658; *Parker v. Cochrane* (1888), 11 Colo., 363, 367; *Barham v. Bell* (1893), 112 N. C., 131.

but for Hall, in-lot 32, in Tiffin, and received from Plaine a deed in fee therefor, containing covenants of seizin, against incumbrances, and of general warranty. The consideration was \$4,000—\$2,000 of which he paid down with the money of Hall, and for the residue gave his three notes, payable in one, two, and three years, with interest, each for \$666.66. On March 23, 1854, Hall assumed the payment of said notes, and executed to Ebbert a bond of indemnity to save him harmless, and Ebbert having been Hall's agent in making said purchase, and being his trustee in receiving and holding the title for his use, in consideration of the premises, conveyed the lot in fee to Hall, who has ever since held, and yet holds, the legal title, and all the interest acquired by Ebbert from Plaine. Before and at the time of said purchase from Plaine, and the execution of said deeds, the lot was incumbered by two outstanding leases, executed by Plaine.

Hall prays judgment against Plaine for damages, and for other relief.

Plaine demurs, assigning for cause that Hall's pleadings do not state facts sufficient to constitute a cause of action against him.

The court of common pleas sustained the demurrer, and gave judgment against Hall. To reverse this judgment Hall filed a petition in error, in the district court, assigning for error;—(1.) That the court erred in sustaining the demurrer; (2.) That the court erred in giving judgment for Plaine instead of Hall.

The district court reserved the case to this court for decision.

A. G. Thurman, for plaintiff in error.

James Pillars, for defendant in error.¹

WILDER, J.—The simple question presented for the consideration and decision of the court in this case is, whether the cross petition, or counterclaim of Hall states facts sufficient to constitute a cause of action in his favor against Plaine.

It is conceded by the counsel of both parties that whether reference be had to the covenant of seizin, against incumbrances, or general warranty, in the deed of Plaine to Ebbert, there was a breach of such covenant at the time of the execution of the deed. It is, thereupon, claimed by the counsel of Plaine, that said covenants did not thereafter run with the land, but became a chose in action—a claim for damages which Ebbert, and Ebbert alone, could enforce against Plaine; that the breach was not only a technical, but a substantial one; that the subsequent conveyance of the in-lot by Ebbert and Hall did not carry with it a right to sue Plaine on his broken covenant with Ebbert, for the reason that the right to sue Plaine, being in Ebbert, could not pass from him, or vest in another, without an assignment or transfer for that purpose, and that a mere deed of conveyance, to transfer the title, does not operate as an assignment of a chose in action; that there is nothing in the pleadings showing that such an assignment was made, or intended to be made, or that Hall predicates his right to sue Plaine, as the assignee

¹ The arguments are omitted.

of this chose in action; that the pleadings show that Hall predicates his right of action against Plaine upon the ground that the covenants in the deed from Plaine to Ebbert are real covenants, running with the land, and passed to Hall by the deed of Ebbert to him, and that the covenants were broken in his hands, and therefore to him belongs the right to sue for such breach.

That the breach was a substantial one, and that a covenant substantially broken does not pass to a subsequent grantee by the mere conveyance of the title, are propositions fully sustained by the authorities cited by counsel. Perhaps at common law it would be difficult for Hall, on the case made in the pleadings, to maintain his action in his own name against Plaine, but it is unnecessary for us to decide that question. The case made in the pleadings does not stand upon the ground assumed by the counsel. It is averred that Ebbert purchased *for Hall*. The consideration was \$4,000 (\$2,000 of which he paid down with *Hall's money*)—and gave his notes for the remaining \$2,000. On the 3d March, 1854, Hall assumed the payment of the notes, and executed to Ebbert a bond of indemnity to save him harmless, and Ebbert, having been *Hall's agent* in making said purchase, and being his trustee in receiving and holding the title for his use, in consideration of the premises, conveyed the lot in fee to Hall, who has ever since held, and yet holds, the legal title, and all the interest acquired by Ebbert from Plaine.

The rule of the common law, that pleadings are to be construed most strongly against the pleader, is abrogated, the rule under the code being that their "obligations shall be liberally construed, with a view to substantial justice between the parties."

The objection here is, that there is no averment of the assignment of the broken covenant by Ebbert to Hall. But it is only a fair construction of the above allegations that Ebbert was the agent of Hall in making the purchase; that he received the title in trust for Hall, and that by the arrangements of the 3d of March, 1854, he transferred to Hall not merely the legal title, but all the interest he acquired from Plaine. The beneficial interest and equitable title was in Hall from the beginning. Before the code Hall could have sued on the covenant in the name of Ebbert, for his (Hall's) use. Hall would have been entitled to the damages recovered, because he was the party, and not Ebbert, by whom the damages were sustained. Since the code that form of procedure is not required. Section 25 of the code provides that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 27." This language is mandatory. In section 27 it is permissive: "An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted." Although

under this section, an action might have been brought by Ebbert, in his own name, "as the person in whose name the contract was made," yet this was not required. Ebbert is a party defendant, and Hall is the real party in interest. The pleadings, therefore, show that the claim is not prosecuted in the name of Hall.

The judgment of the court of common pleas is reversed. The demurrer is overruled, and the cause remanded to the court of common pleas for further proceedings.

PECK, C. J., and BRINKERHOFF and SCOTT, JJ., concurred.

RANNEY, J., having been of counsel for one of the parties, did not sit in the case.

SILLIMAN *v.* TUTTLE.

SURPEME COURT OF NEW YORK, GENERAL TERM, SEPTEMBER 18, 1865.

[45 *Barb.* 171.]

This is an action brought by forwarding and commission merchants, for the non-performance of an agreement made by the agent of the defendants, in their behalf, concerning the freight and expenses of a certain canal boat. In June, 1864, the plaintiffs sold to the defendants, through their agent, the canal boat, *A. H. Burch*. A bill of sale was executed by the plaintiffs and delivered to the agent, at the time of the sale. The boat was then on her way to Buffalo, with a load of merchandise.

It was agreed by and between the plaintiffs and the said agent, that Tuttle and Wagner should collect and receive all the freights, as their own, and pay the plaintiffs the expenses of the trip incurred by them. The plaintiffs never received any of the profits, and the defendants have never paid the expenses of the same.

The cause was tried before Geo. Gould, referee, and upon the trial the defendants' counsel insisted that there could be no recovery in the action, in favor of the plaintiffs, for the reason that the contract for the sale of the boat was made with Robert F. Silliman, one of the plaintiffs, alone, and not with the plaintiffs jointly. Also upon the ground that the contract for the sale of the boat was in writing, and that parol evidence, offered in relation to the expenses of the boat upon the trip she was prosecuting at the time of the sale, and the evidence that the plaintiffs were to have and receive the freights earned upon that trip, could not properly be received, for the reason that such evidence varied and contradicted the terms of the written contract. The referee ruled and decided that all the plaintiffs were properly joined in the action.

C. M. White, for the appellant.

W. A. Beach, Jun., for the respondent.

By the Court, MILLER, J.—It is objected that the contract now in question having been made by Robert F. Silliman alone with the defendants, a joint action can not be maintained by the plaintiffs.

The Code, section 111, provides that all actions shall be brought in the name of the real party in interest. For business convenience the title to the property sold to the defendants was in the name of one of the plaintiffs. The sale, however, was made for the benefit of all the parties, and they were jointly interested in the contract. Although one of the plaintiffs conducted the negotiations and executed the bill of sale in his individual name, yet all being interested, I think that the contract enured for their joint benefit.

It does not alter the case that the defendants were ignorant of the fact that the plaintiffs were jointly interested, so far as the commencement of this action is concerned. As principals they had a perfect right to avail themselves of the acts of their agent, and whether he acted with or without authority in the negotiation and in using his own name makes not the least difference. This can not change the relation of the other parties in interest, and as long as they were owners they can not be deprived of the legal right to maintain an action upon the contract. If they had an interest, then they were proper plaintiffs in the action. They can sue and were liable to be prosecuted.

The case of *Niles v. Culver*, 8 Barb. 205, is relied upon as an authority to sustain the doctrine contended for by the defendants' counsel. In that case the action was brought to recover damages for failure to perform a contract. The decision turned mainly upon the point whether oral stipulations or negotiations immediately preceding or accompanying the execution of a written agreement could be introduced in evidence; and the court, after holding that they were merged in the instrument, which disposed of the case, also decided that the instrument showing that the contract was made with one of the plaintiffs, the action could not be maintained. It may be remarked that the action was directly on the contract, which was in writing, and of course controlling; while here, so far as the plaintiffs claim to recover, their right is based upon a parol agreement outside of the sale of the property, and it may be said independent of, and separate and distinct from it, and relating entirely to the earnings and expenses of the boat while in the progress of a trip, and not to a transfer and sale of the boat itself. It may also be observed that the doctrine laid down by the learned judge who wrote the opinion, was a mere *dictum*, without any discussion of the principle involved, and without any reference to the provision of the Code which I have cited; nor was it necessary to decide that point in order to dispose of the case. Nor does it appear that his attention was called to the change made by the Code in this respect.

The position taken, that the bill of sale was in the nature of a deed, and that no one but a party to the instrument can maintain the action, is likewise untenable. As before remarked, the action is not on the bill

of sale, but on a contract distinct from it, and which is dependent upon evidence outside of the bill of sale. I think, therefore, that the action was properly brought in the name of the plaintiffs.¹

Judgment affirmed.

THE FIRST NATIONAL BANK OF GREENFIELD *v.* THE MARIETTA AND CINCINNATI RAILROAD COMPANY.

SUPREME COURT OF OHIO, DECEMBER TERM, 1870.

[20 O. S. 259.]

On October 3, 1865, the plaintiff, The First National Bank of Greenfield, filed in the Superior Court of Cincinnati a petition alleging that the defendant was a corporation created by the laws of Ohio, and, as such, owned and operated a railroad from Marietta to Cincinnati through the town of Greenfield, that said road crossed a certain creek, called Lee's Creek, by means of a bridge built by the defendant, and that the defendant was a common carrier of passengers and goods over its railroad by means of locomotives and cars; that on February 14, 1865, the plaintiff was the owner and possessor of a package of legal tender notes, issued by the United States, to the amount of \$4,000, and wishing to transmit the same to Cincinnati, delivered them to Thomas G. McElroy, its agent, to be carried by him to said city; that the said McElroy, for that purpose entered one of the cars of the defendant at Greenfield, one of a train provided by defendant for the purpose, as a passenger, to be carried by the defendant over its railroad to Cincinnati, with said package of money of the plaintiff in his possession; that the defendant therefore caused its locomotive and train of cars, with the said McElroy therein, having on his person the said package of notes, to go and be drawn upon the said bridge over the said creek and proceed to Cincinnati; that said bridge was so carelessly, negligently, and unskillfully constructed and maintained by the defendant, that the central pier became and was undermined by the waters of the creek, and fell, whereby the bridge became insufficient to support the weight of the locomotive and train of cars so upon same as aforesaid; and that the defendant so carelessly, unskillfully, and negligently ran the said train upon the approach to said bridge, that although the said pier had fallen and the bridge had thereby been rendered unsafe for the passage of the said train six hours before its arrival, yet the defendant did not cause the same to stop, but suffered the same to proceed upon the said bridge for the purpose of crossing the same; by reason whereof, the weight of the locomotive and train of cars crushed the bridge and fell down into the creek, whereby the said McElroy, so upon the said car, was killed and the

¹ Only so much of the case is given as refers to the one point.

ruins of the cars having been set on fire by the overturning of the stoves therein, his body was consumed, and the package of money burnt up and destroyed; to the plaintiff's damage, etc.

To this petition the defendant demurred, on the ground that the facts stated were not sufficient to constitute a cause of action.

This demurrer was sustained, and judgment rendered for the defendant.

To reverse this judgment a petition in error was filed in this court.

S. & S. R. Matthews (with *Mills Gardner*), for plaintiff in error.

Hoadly, Jackson & Johnson, for defendant in error.¹

SCOTT, J.—If the facts stated in the petition show the defendant to have been guilty of a breach of contract, or derelict in respect to a legal duty, we think the plaintiff's claim can not be resisted on the ground that the contract was made, not with the plaintiff, but with an agent acting in his own name, or that the supposed duty was owing to the agent and not to his principal. The bank had the same right to send the notes in controversy by McElroy as a special agent, as it would to have carried them over the same road under the same circumstances through its president, cashier, or any other officer; and McElroy had the same right to carry the notes for the bank, as for himself, had they been his property. We fully concur with the supreme court of the United States in the case of *The New Jersey Steam Navigation Co. v. The Merchants' Bank of Boston*, 6 Howard, 344 (cited by counsel), where it is said: "The cases are numerous in which the general owner has sustained an action of tort against the wrongdoer for injuries to the property while in the hands of the bailee. The above cases (referring to cases previously cited,) show that it may be equally well sustained for a breach of contract entered into between the bailee and a third person. The court look to the substantial parties in interest, with a view to avoid circuity of action, saving, at the same time, to the defendant all the rights belonging to him if the suit had been in the name of the agent.

We may add that our code of civil procedure requires actions generally to be prosecuted in the name of the real party in interest; and if the plaintiff's property was destroyed solely through the negligence of the defendant, and without fault on the part of the agent, it is clear that the estate of the latter can not be held liable for the loss, and the liability, if there be one, rests on the defendant. We think, then, that the case stands on the same grounds and presents precisely the same questions, as though the notes had been the property of McElroy, and he having survived, had brought this action to recover of the defendant for their loss.²

¹ The arguments are omitted.

² The demurrer was however sustained upon the ground (1.) that the case stated in the petition did not come within the operation of the maxim which requires every one so to conduct his business as not to do injury to another; and (2.) that the defendant as a common carrier of passengers was not liable for the loss of money kept in the sole custody of a passenger, and carried by him without notice to the defendant, for a purpose unconnected with the

ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY CO. *v.*
S. O. THACHER.

SUPREME COURT OF KANSAS, JULY TERM, 1874.

[13 Kan. 564.]

Action by S. O. Thatcher as plaintiff to recover for damages sustained to 17 of the 35 head of cattle mentioned in the contract set out in the case of the *St. Louis, Kansas City & Northern Railway Co. v. Piper*, reported in 13 Kan. 505, 510.¹

All the questions in this case were determined in the case cited, except whether Thacher could maintain an action in his own name on said contract. Thacher had judgment at the September term, 1873, of the district court, and the Railway Company brings the case here on error.

Pratt & Ferry, for plaintiff in error.

Thacher & Stephens, for defendant in error.²

expenses of the journey, notwithstanding such loss was occasioned by the negligence of the defendant's servants.—*Ed.*

¹ The case and the contract referred to here were as follows: On November 27, 1872, one Piper shipped from the stockyards at Kansas City, by the railway of plaintiff in error, a lot of cattle to Chicago. The shipment was under a written contract, of which the following is a copy:

"THIS AGREEMENT, made this 27th of November, 1872, between the *St. Louis, Kansas City & Northern Railway Company*, party of the first part, and *G. W. Piper*, care Hugh, Reeves & Sturgis, party of the second part, witnesseth: That the party of the first part will forward for the party of the second part the following freight, to-wit, two cars of cattle, 35 head, M. or L., from Kansas City to Chicago, at the rate of \$70 per car, which is a reduced rate, made expressly in consideration of this agreement, in consideration of which the party of the second part agrees to take care of said freight while on the trip, and load and unload the same at his or their own risk and expense, and that the party of the first part and connecting lines over which such freight may pass shall not be responsible for any loss, damage, or injury which may happen to said freight in loading, forwarding or unloading; by suffocation, or other injury caused by overloading cars; by escapes from any cause whatever; or by any accident in operating the road, or delay caused by storm, fire, failure of machinery or cars, or obstruction of track from any cause, or by fire from any cause whatever, or by any other cause except gross negligence; and that said party of the first part and such connecting lines shall be deemed merely forwarders, and not common-carriers, and only liable for such loss, damage, injury or destruction of such freight as may be caused by gross negligence only, and not otherwise; and the said party of the second part agrees to assume all risk of damage or injury to, or escape of, the live stock which may happen to them while in the stock yards awaiting shipment. It is also further agreed between the parties hereto, that the person or persons riding free under this contract, in charge of the stock do so at their own risk of personal injury from whatever cause. Charges \$28.50."

The transportation was delayed. The cattle were injured. Their value in the Chicago market was depreciated and the shipper was put to extra expense for feed, etc., for all which he brought his action before a justice of the peace of Douglas county. He recovered a judgment of \$300 before the justice, from which the company appealed. In the district court he recovered a judgment of \$280.15. The case going up on error, the judgment was affirmed. *St. Louis, Kansas City & Northern Ry. v. Piper* (1874), 13 Kan. 505, 510, 513.—*Ed.*

² The arguments are omitted.

VALENTINE, J.—On November 27th 1872, G. W. Piper shipped thirty-five head of cattle from Kansas City to Chicago under a written contract between himself and the plaintiff in error, a copy of which contract will be found in the case of this plaintiff in error against Piper, recently decided in this court; (*ante*, 510.) Eighteen head of said cattle belonged to Piper, and the other seventeen head belonged to the defendant in error, S. O. Thacher. With reference to these seventeen head of cattle, Piper was merely the agent of Thacher for their transportation and sale. There were delays in their transportation claimed to have been caused by the neglect of the railway company, in consequence of which delays the cattle were injured, their value depreciated, and extra expense incurred. Piper and Thacher then sued the railway company, each bringing a separate action for his own separate loss, and each obtained a judgment against the railway company. The railway company then brought both of the cases to this court for review. We have already decided Piper's case, and in that decision have disposed of every legal question involved in this case except one. That question is, whether Thacher can maintain a separate action for his own separate loss, notwithstanding the fact that the railway company contracted with Piper alone, and had no knowledge of Thacher's interest in the transaction.

That Piper could alone maintain an action for the whole loss, including that sustained by Thacher as well as that sustained by himself, we suppose will not be questioned; for "a person with whom or in whose name a contract is made for the benefit of another . . . may bring an action without joining with him the person for whose benefit it was prosecuted." (Civil Code, § 28.) But whether what might be a single cause of action in favor of Piper may be so divided as to give to Piper and Thacher each a cause of action for that portion of the loss which each has severally sustained, is the question now to be considered by this court. If Thacher had owned all the cattle, instead of only a portion of them, he could unquestionably have maintained an action for the whole loss sustained, for it is generally conceded that under our code, as well as in equity, where a contract is made by an agent for the benefit of his principal the principal may sue on the contract, even though the agent may also have the right to sue, and even where the contract is made in the name of the agent, and the principal's name is not disclosed.¹ The principal in every such case is "the real party in interest," and under our code the rule is, that "every action must be prosecuted in the name of the real party in interest." (Code, § 26.) Every action allowed to be prosecuted in any other manner constitutes an exception to a general rule. But these exceptions are generally not exclusive. For instance, there are many actions that may be prosecuted in the name of the agent, or in the name of the principal, at the election

¹ Citing *Erickson v. Compton*, 6 How. Pr., 471; *Union India Rubber Company v. Tomlinson*, 1 E. D. Smith, 364; *Morgan v. Reed*, 7 Abbott, 215; *Thompson v. Thompson*, 4 Ohio St., 274; *Brooks v. Minturn*, 1 Cal., 481; *Ruiz v. Norton*, 5 Cal. 358.

of the parties; and if Thacher had owned all the cattle in this case this unquestionably would be one of such actions. (1 Waite's Prac., 96.) This should be so, for on the one hand there are many cases where the principal resides in another State and could not well attend personally to the suit himself, and on the other hand there are other cases where the agent may have been discharged and no longer has any interest in the principal's affairs. Indeed, the agent's interest may become hostile to those of the principal's, and in such a case it would not be well for the agent alone to have the power to prosecute the action for the principal. In the present case Piper's agency ceased when he shipped said cattle to Chicago and sold them; and it would seem absurd that he alone could sue for Thacher's loss. Suppose he should neglect or refuse to sue, would Thacher be without a remedy? And having no interest in Thacher's loss, he might well neglect or refuse to sue. As the railway company were liable on only one contract, and as both Piper's and Thacher's actions were prosecuted in the same court, and at the same time, it is possible that the railway company could have compelled a consolidation of the two suits; or it is possible that they could have compelled Thacher to make Piper a party, either plaintiff or defendant, in Thacher's suit. But none of these questions having been raised in the court below, we do not choose to decide them now. There was no attempt made to consolidate the two suits. There was no attempt made to make Piper a party in Thacher's suit. And there was no claim made that there was a defect of parties, either plaintiff or defendant. The suit was tried upon its merits, and upon its merits Thacher recovered the judgment of which the plaintiff in error now complains; and under the circumstances of this case we think that the judgment was correct, and that the court below did not err in rendering the same.

And by allowing Thacher to recover it can hardly be said that it is a division of a single cause of action into two separate causes of action. It is true, that the contract under which both Piper's and Thacher's causes of action arose is a single contract, yet as the cattle belonged to separate owners the railway company, by causing the cattle to be injured, created two causes of action, one in favor of Piper, and the other in favor of Thacher, and each was created at the same time, neither having precedence to the other with regard to time. And the rule is, as we have before seen, that Thacher should sue for his own loss, although by way of exception to the rule Piper might also sue for Thacher's loss, if Thacher himself had not done so. But if Piper should have sued for both his own loss and that of Thacher's, in the same suit, and as one cause of action, it would properly have been the consolidation of two causes of action.

To recapitulate: The railway company by injuring the cattle created two causes of action. These may be prosecuted separately by the respective owners of the cattle, or may be consolidated and prosecuted

by Piper alone. But even if by allowing each owner of the cattle to prosecute for his own loss would be to divide a single cause of action into two separate causes of action, still it is possible that such a thing may be done. In New York it has been held, that when an entire demand has been assigned in parts to several persons, the assignee of one of the parts may maintain an action to recover his part.¹

But it would seem in such cases that all persons interested in the matter should be made parties to the action, if any party should demand it.

The judgment of the court below is affirmed.

All the justices concurring.

SCHAEFER v. HENKEL.

COURT OF APPEALS OF NEW YORK, DECEMBER 10, 1878.

[75 N. Y. 378.]

Appeal from a judgment of the General Term of the Court of Common Pleas affirming a judgment in favor of the defendant, entered upon an order dismissing the complaint on trial.

This action was upon a lease, under seal, of certain premises in New York, which lease was executed by "J. Romaine, agent," as lessor and by defendant as lessee.

The facts appear in the opinion.

James A. Deering, for appellants.

James Clark and J. Henry McCarthy, for respondent.²

MILLER, J.—The plaintiffs were not parties to the lease upon which this action was brought. It was not signed by them. Their names did not appear in it, and there was nothing in the lease to show that they had anything to do with or any interest in the demised premises or the execution of the lease, or that it was executed in their behalf. It was made by one Brown, as lessor, who is described therein, and who signed it, as agent; but it is not stated in the lease for whom he acted. The covenants are all between "J. Romaine Brown, agent, the party of the first part," and the defendant, as party of the second part; and it is not made to appear that the defendant had any knowledge or intimation whatever that Brown was acting on the behalf of the plaintiffs or for their benefit. For whom Brown was agent was not made known to the defendant, and it only appears by parol proof upon the trial that Brown was authorized orally by the plaintiffs to make a demise of the premises described in the lease. The signature of Brown is as agent, and his seal is attached to the instrument and the same is also signed and sealed by the defendant. The plaintiffs, without any assignment of

¹ *Citing Cook v. Genesee Mutual Ins. Co.*, 8 How. Pr., 514; *Field v. Mayor of New York*, 6 N. Y. 179; *Christie v. Herrick*, 1 Barb. Ch., 258, 259.

² The arguments are omitted.

Brown's interest under the lease, bring this action to recover the rent unpaid, upon the ground that Brown merely acted as their agent by their authority, and that they are the actual parties in interest.

The question to be determined is whether the actual owners of the lease, which is in the nature of a deed *inter partes*, which was not and does not on its face show that it was executed by them, but which does show an execution by a third person, claiming to act as agent without disclosing the name of his principal, and which contains covenants between the parties actually signing and sealing the same, can maintain an action upon it for the rent reserved therein, even although the person who executed the same, describing himself "agent and party of the first part," had oral authority to enter into the contract, and acted as the owner's agent in the transaction.

The rule seems to be quite well established, that in general an action upon a sealed instrument of this description must be brought by and in the name of a person who is a party to such instrument, and that a third person or a stranger to the instrument can not maintain an action upon the same. The question presented has been the subject of frequent consideration in the courts, and I think it is established in this State that where it distinctly appears from the instrument executed that the seal affixed is the seal of the person subscribing, who designates himself as agent, and not the seal of the principal, that the former only is the real party who can maintain an action on the same. He alone enters into the covenants and is liable for any failure to fulfill, and he only can prosecute the other party. He is named in the indenture as a party, and an action will not lie on behalf of or against any person who is not a party to the instrument, or who does not lawfully represent or occupy the place of such party.

It is unnecessary to review all the decisions bearing on the question, as in a very recent case the principle discussed has been considered by this court, and the whole subject, as well as the decisions relating to the same, deliberately and carefully reviewed. See *Briggs v. Partridge*, 4 N. Y. 357. In the case cited, an action was brought to recover purchase-money unpaid upon a contract for the sale and purchase of lands. The complaint alleged that the plaintiff entered into an agreement in writing with one Hurlburt, who was acting under the authority of the defendants, whereby the plaintiffs sold and the defendants through Hurlburt bought a certain described piece of land, for a price named, which price the defendants, through their agent, Hurlburt, agreed to pay, as specified. The agreement was in writing, but did not show that Partridge was a principal party, and was signed and sealed by Hurlburt individually. The name of Partridge did not appear in the instrument, but the plaintiffs offered to prove that Hurlburt was acting solely for and under the direction of Partridge, who made or caused the first payment to be made as Partridge's agent or trustee in the transaction, and that his authority was oral. Proof was also offered to show

that Hurlburt was constituted such agent by parol; and that the plaintiffs did not know that Partridge was the real principal. The complaint was dismissed, and it was held by the court that a contract of this description under seal could not be enforced as the simple contract of another not mentioned in or a party to the instrument, on proof that the vendee named had oral authority from such other to enter into the contract, and acted as agent in the transaction; at least in the absence of proof of some act of ratification on the part of the undisclosed principal. The opinion of ANDREWS, J., in the case cited, fully covers the question now presented; and it appears to be unnecessary to review or examine the prior cases which have a bearing upon the subject. Unless some distinction of vital character exists between that case and the one now to be determined, the former must be regarded as decisive of the case at bar.

The claim of the learned counsel for the appellant, that as the contract in case of a lease is not required to be under seal, it may be regarded as a simple contract, upon which the principal may sue or be sued in his own name, and the seal may be rejected as surplusage, is also considered in the opinion in the case cited; and without indorsing the correctness of the cases relied upon, it is remarked that there are cases which hold this doctrine; "but the principal's interest in the contract appears upon its face, and he has received the benefit of performance by the other party, and has ratified and confirmed it by acts *in pais*." It is therefore settled law, that in order to take a case out of the general rule, where the contract is one which is valid without a seal, and the seal is therefore of no account, it must appear that the contract was really made on behalf of the principal, from the instrument, and that the party derived benefit from and accepted and confirmed it by acts on his part.

Within this rule, it remains to be considered whether the case at bar differs from that cited. An attempted distinction is sought to be maintained, for the reason that, in the case cited, Hurlburt, the agent, did not enter into the agreement to sell as *agent*, while here Brown signs as agent, which, it is claimed, is notice of the capacity in which he contracts. This, we think, is not sufficient; and to establish any real distinction it should appear for whom he was agent, and that the parties claiming were his principals. The plaintiffs not being named in the lease, and it not appearing that they had any interest therein, there is no more ground for claiming that Brown was their agent than that he was the agent of some stranger. The use of the word *agent* has but little significance of itself, and as the principals are not named, can not be regarded as applying more to one person than to another. It did not take away from Brown's obligation, because he is named as agent. The covenants are between the parties who are only named in the instrument and no other parties. Any other interpretation would be a contravention of its obvious import. As was said in the case cited: "We

find *no* authority for the proposition that a contract *under seal* may be turned into the *simple contract* of a party not in any way appearing on its face to be a party to or interested in it, on proof *dehors* the instrument, that the nominal party was acting as the agent of another." To render the principal liable, where there is a contract by deed, made by an attorney or agent, it must be made in the name of the principal: *Huntington v. Knox*, 7 Cush., 374, cited and approved in *Briggs v. Partridge, supra*. It would be going very far to hold that a distinction so trifling and unimportant would authorize a disregard of the decision cited, and thus virtually establish a new and different principle than the one which has been settled thereby.

Another point is made, that the plaintiffs have ratified the contract, and the defendant has been in possession, and have paid the plaintiffs \$150 on account of the rent. There is no evidence of any possession otherwise than that under the lease which was executed by Brown; and the presumption is that it was in pursuance thereof, and not under the plaintiffs. Nor does the proof show any payment of rent to the plaintiffs. The complaint alleges that no part has been paid except the sum of \$150; and the proof shows that a balance was due, deducting this. It may therefore have been paid to Brown and not to the plaintiffs, and no presumption arises that it was to the plaintiffs. The case of *Briggs v. Partridge, supra*, disposes of the question considered; and if we follow that decision, there is no ground for claiming that the plaintiffs can maintain the action.

It is also urged that the plaintiffs can maintain the action under the code (§ 111) as the real parties in interest. One great object of this provision was, to enable an assignee of a *chose* in action to sue in his own name; and it would be placing a construction upon this provision which is I think unwarranted, to hold that a sealed instrument executed by parties belongs to another, without any transfer whatever by a party named therein. The parties whose signatures and seals are affixed to such an instrument, and who alone are named therein, are the real parties in interest, for they only are bound thereby. No right therefore exists in a stranger as against one of them, until there is an assignment of the interest of such party. It is enough to say that the plaintiffs were not lawfully entitled to the rent, under the lease, or the defendant bound to pay them therefor, until a transfer of the lessor's interest, or until some recognition of the plaintiff's title thereto by the defendant, which does not appear to have been made. For anything which appears, another suit may have been brought by Brown to recover the very same rent, and it is not clear what valid defence could be interposed to such an action.

The waiver of further testimony on the trial by the defendant did not, we think, aid the plaintiffs' case. It was accompanied by a distinct statement of the grounds upon which the defendant claimed that plaintiffs had failed to make out a case, and that it was not claimed, on

the part of the plaintiffs, that the premises described in the complaint were let or demised to the defendant, otherwise than by the indenture of lease or otherwise occupied by him. This left the case to be determined upon by the lease as given in evidence, and did not warrant an inference that there was other evidence to establish the plaintiffs' claim.

It is urged that it is not essential to the plaintiffs' right to recover that they should claim under the lease, but as the contract is one not required to be under seal or even in writing, there is no ground for claiming that the principal can be deprived of his remedy. It is a complete answer to this position to say that no such question was presented upon the trial, and the plaintiffs do claim under the lease. The complaint sets it up, and the evidence establishes its execution. Had the plaintiffs sued for use and occupation, claiming that Brown, as their agent, had acted without authority in taking the lease in his own name, and that it really was made for the plaintiffs' benefit, a different case would arise. But such is not the fact; but the claim of the plaintiffs to recover rent rests upon the lease entirely.

Nor can it be claimed, upon any valid ground, that the question now presented is whether the lease is a bar, for the apparent reason that the plaintiffs have made the lease the foundation of their right to recover, and claim under it, and under no other or different agreement.

Upon the trial, the plaintiff proved by the agent, Brown, that he was authorized orally to demise the premises, in the complaint mentioned, and that he did so by the instrument in question. It was also proved that the defendant entered upon the premises and occupied the same; and that the amount claimed was due thereon. At this stage of the case, the defendant's counsel claimed that the lease was not the act and deed of the plaintiffs'; and that they had no cause of action arising out of the same against the defendant, no proof being offered, and it not being claimed that the premises were let otherwise than under the lease. The plaintiffs made no application to amend the pleadings, nor any claim that a recovery could be had except upon the lease. As no question was made upon the trial as to the authority of the agent to make the lease in the form it was executed, it can not be urged, upon this appeal, that the question arises whether the agent could cut off the plaintiff's rights or remedy. In the absence of direct proof that the agent exceeded his authority, and without the presentation of such a question upon the trial, it is difficult to see upon what basis any such claim rests. Even if, in a suit brought for that purpose, where the complaint sets forth all the facts, the acts of the agent's, when he exceeds his powers, may be disregarded, there is no principle which upholds this doctrine, and no authority for holding that when the action is brought upon the instrument itself, which is now alleged to have been unauthorized, and no proof given of any want of authority or point made upon the trial on the subject, that the plaintiff can recover. But it is sufficient to say that the plaintiffs did not seek

relief upon any such ground, either in the complaint or upon the trial. If they had applied to amend the complaint, it would have rested with the court to determine whether the amendment proposed was proper, and upon what grounds or terms, if any, such an application should be granted.

Some authorities are cited, for the purpose of upholding the position that the deed may be resorted to as evidence of the terms of the agreement, although it can not be enforced as a specialty. Conceding that this may be done, when the action is brought setting forth the want of authority, we think that such is not the case where the complaint in the action is founded entirely upon the instrument, and the plaintiffs upon the trial claimed to recover solely by virtue thereof. A reference to some of the cases relied upon does not, I think, sustain the doctrine contended for, where no issue is made as to the authority of the agent. In *Evans v. Wells*, 22 Wend., 324, the action was brought against the makers of the promissory note; and the question involved was as to the authority of an agent to execute a release in his own name to compromise the claim, and the competency of proof showing a ratification by parol and acceptance of the fruits of the release, as well as the effect of the same. It is quite manifest that the testimony was competent, as this distinct issue was presented upon the trial; and while the decision of the court was entirely correct, it has no application to the case at bar. It may be added, that the case is authority against the plaintiffs, as it was held that the release was invalid as to the principal, and could only be made binding by a subsequent ratification. *Haight v. Sahler*, 30 Barb., 218, holds that a corporation is liable upon its contract, although the agents have affixed their own seals, when the instrument on its face purports to have been executed by the corporation, and their seals were ratified by the corporation, and it is apparent that there was no intention to bind the agents. This was decided upon the authority of *Randall v. Van Vechten*, 19 Johns., 60; but neither of these cases affect the question now considered. The other cases cited do not aid the plaintiffs' case, or present the characteristic features which distinguish the case at bar. We do not deem it necessary to examine them fully; and it is enough to say that none of them hold that, under circumstances like those here presented, the principal can recover.

The principle has long been settled by authority that to render an instrument of this nature, signed by an agent in his own name, binding on the principal, it must appear from the contract itself that it purports to be made by the principal, before it can be considered as obligatory upon the principal. See *Squeir v. Norris*, 1 Lans. 282, where the authorities are considered. This rule is applicable here; and it is too late, we think, to change a principle which has so long been acquiesced in.

We find no error on the trial, and are of opinion that the judgment must be affirmed.¹

CHURCH, CH. J., FOLGER, ANDREWS, and EARL, JJ., concur.

RAPALLO and ALLEN, JJ., dissent.

Judgment affirmed.

NICOLL v. BURKE.

COURT OF APPEALS OF NEW YORK, NOVEMBER 18, 1879.

[78 N. Y. 580.]

Appeal from a judgment of the General Term of the Superior Court of the City of New York, affirming a judgment in favor of plaintiffs, entered upon a verdict.

This action was brought to recover rent alleged to be due under a lease of certain premises in the city of New York.

Plaintiffs gave in evidence a written lease, not under seal, executed by defendant, dated January 28, 1873, in which the lessors are thus named: "William and E. A. Cruikshank, agents, as landlords." The lease was for a term of one year from May 1, 1873, and contained an agreement on the part of the tenant to keep the premises in good repair. Evidence was also given that the persons named had verbal authority to lease the premises as agents of the plaintiffs, who were the owners. This evidence and the lease were objected to on the ground that the lease was not made in the plaintiffs' names; the objections were overruled and exceptions taken.

Further facts appear in the opinion.²

¹ Compare *Whitford v. Laidler* (1883), 94 N. Y., 145.

"The plaintiffs attached to their names in the contract with the village the word 'agents,' and it appeared upon the trial that in the making of the contract and the erection of the building they were actually the agents of their wives, although the contract did not purport to bind and did not describe or name the wives as principals. In form it bound the plaintiffs only. They were obligees in the bond under the name of 'M. Henricus & Son, agents,' no other person being described or named in any way as obligee. One of the defences insisted upon by the defendant was that the plaintiffs were not the real parties in interest, and could not maintain this action in their names. The bond was their bond, although the word 'agents' followed their names therein. The defendant did not bind himself or become under obligation to any other person, and the plaintiffs are the only persons who can maintain an action upon the bond, a sealed instrument; and so it has frequently been held. (*Briggs v. Partridge*, 64 N. Y. 357; *Kiersted v. R. R. Co.*, 69 *id.* 343; *Schaefer v. Henkel*, 75 *id.* 378.) If this instrument had not been under seal a different rule would have applied, and the real parties in interest, the wives of these plaintiffs, for whom they were acting as agents, could have maintained an action thereon. But where an instrument is under a seal, no person can sue or be sued to enforce the covenants therein contained, except those who are named as parties to the instrument and who signed and sealed the same." *Per* EARL, J., in *Henricus v. Englert* (1893), 137 N. Y., 488, 494.

² Part of the reporter's statement of facts is omitted.

Nelson J. Waterbury, for appellant.

Walter D. Edmonds, for respondents.¹

MILLER, J.—The plaintiffs in their complaint claim to recover for the rent of certain premises therein described, by virtue of a lease made by their agents, William and E. A. Cruikshank, for the term of one year from the first day of May, 1873. We think that the written lease and indorsements on the same, signed by the defendant, of a renewal thereof from year to year, including the last year, to recover a portion of the rent for which this action was brought, were competent evidence to sustain the complaint.

The lease purports to have been made by the lessors named therein, who are stated to be "agents, as landlords," with the defendant in 1873, and renewals from year to year including the year 1876, are indorsed upon the same. The lease as well as the indorsements are signed by the defendant only and are not under seal. There was evidently a counterpart to the instrument originally signed by the defendant, but it is not produced and the proof does not show by whom it was signed, if it existed. It appears, however, that the Cruikshanks were agents of the testator who owned the premises; that one Nicoll had charge of the property for the executors in 1876; and that the last renewal of the lease was made under his direction by one Augustus Cruikshank, who was the successor of William and E. A. Cruikshank, who were named in the lease, as already stated.

The lease not being under seal, it was entirely competent evidence as a written parol executory contract, entered into by an agent in his own name within his authority, although the name of the principal does not appear in the instrument. The principle is well settled, that if the agent possesses due authority to make a written contract not under seal and he makes it in his own name, whether he describes himself as agent or not, or whether the principal be known or unknown, his principal may be made liable and will be entitled to sue thereon in all cases, and the instrument may be resorted to for the purpose of ascertaining the terms of agreement. This doctrine is fully sustained in *Briggs v. Partridge*, 64 N. Y. 357, 362, 364, where the authorities bearing on the subject are cited and considered. (See also *Story on Agency*, § 160.)² A different rule prevails as to sealed instruments; but where the contract is in writing or by parol, not under seal, in the name of the agent and within his authority, the principal can enforce the same and is liable thereon. The contract for the letting of the premises in question from year to year was not required to be in writing. The defendant understood that the agents were acting for others and were liable to the principals.

The particular phraseology used in the lease describing the agents "as landlords" does not change the rule or prevent its application to

¹ The arguments are omitted.

² And see *Brady v. Nally* (1896), 151 N. Y. 258, 262.—*Ed.*

contracts not under seal. In fact, the counterpart of the lease not being produced, and it being no doubt in the defendant's possession, and it not appearing in what manner it was executed by the lessors, and the proof showing that the plaintiffs were the landlords and entitled to the rents, it was reasonable to assume that it was executed by their agents for their benefit and on their account. The cases cited by the learned counsel for the defendant to establish the doctrine that the lease, as it was, could only be enforced by the agents, do not sustain the principle contended for. Most of them relate to instruments under seal and none of them hold that the principal can not recover where the contract is made by the agent within his authority, either written or parol, when not under seal.¹

Judgment accordingly.

LUDWIG v. GILLESPIE.

COURT OF APPEALS OF NEW YORK, APRIL 19, 1887.

[105 N. Y. 653.]

The following is the *mem.* of opinion herein :

"The action was to recover \$22,251.60, as the price of certain bitumen theretofore sold and delivered by the plaintiff to the defendant. Besides a general denial, the answer set up that the bitumen was sold and delivered by the plaintiff, not on his own account,

"but as known agent for the firm of Arles, Dufour & Co., his disclosed principals under a special contract in writing, and without authority to receive the proceeds of such sales,"

and upon this defence the defendant upon trial of the issues before a referee, asked a dismissal of the complaint. His request was denied and judgment went against him, both upon the report of the referee and at the General Term.

"The principal point made in his behalf upon this appeal is that the action was improperly brought by the plaintiff in his own name. It appeared that the contract was negotiated by one Clark, a broker, who in that character made and signed a writing which, so far as is material, was in these words:

'New York, April 25, 1882.—Sold for account of Mr. E. Ludwig, Agt., to Mr. L. C. Gillespie, four thousand (4,000) cases Syrian bitumen.'

A time for delivery was specified and the price declared 'payable thirty days from each delivery.' This contract was assented to by both parties, and the referee finds that 'there was no proof that the name of Arles, Dufour & Co. was disclosed or mentioned as the

¹ Part of the opinion, dealing with other points, is omitted.

principal of the plaintiff in the negotiations for the sale, nor at any time before this contract had been executed and delivered;" but he also finds that at the time of making it the 'plaintiff was in fact the agent of Arles, Dufour & Co., of Marseilles, France, for the sale of imported goods,' and that the bitumen was sold and delivered by him, not on his own account, but for and on account of Arles, Dufour & Co., and as their agent.

"The evidence sustains these findings, and the case is thus brought within the well established rule of law that when a contract not under seal is made with an agent in his own name for an undisclosed principal, whether he describes himself to be an agent or not, either the agent or principal may sue upon it. *Considerant v. Brisbane*, 22 N. Y. 389; *Schaefer v. Henkel*, 75 N. Y. 378.

"The defendant has received the thing bargained for and a recovery by the plaintiff and payment of the judgment will be a complete protection to the defendant against any claim of the principal arising upon the contract.

"The other questions presented by the appellant relate to rulings by the referee upon offers of evidence, and were properly held by the General Term to be without merit.

"The judgment should be affirmed."

William Hildreth Field, for appellant.

M. W. Divine, for respondent.

DANFORTH, J., reads for affirmance.

All concur.

Judgment affirmed.

MELCHER, AS ATTORNEY AND AGENT FOR THE
OWNERS, *v.* KREISER.

SUPREME COURT OF NEW YORK, SPECIAL TERM, AUGUST, 1897.

[21 Misc. 159.]

Motion by plaintiff to strike out the answer as sham and frivolous, and for judgment.

John S. Melcher, for plaintiff.

Isaac Fromme, for defendant.

RUSSELL, J.—The motion in this case presents a novel question for solution. The plaintiff asks that the answer be stricken out as sham and frivolous and for judgment. The plaintiff sues for rental due at the rate of \$400 per month, upon the averment of a lease in writing by the plaintiff to the defendant and possession thereunder by the defendant. The answer denies the allegations of the leasing and affirmatively avers that the plaintiff is not the real party in interest, but merely an attorney or agent for the real parties, L. S. Melcher and Mary Paget. The title indicates that the plaintiff is simply attorney and agent for

the owners, and the plaintiff's attorney submits the lease on the motion made "between John L. Melcher, of New York City, as attorney and agent of the owners of the premises hereinafter described, party of the first part, lessor, and Samuel Kreiser of said city, lessee, party of the second part." The lease is signed,—

JOHN L. MELCHER, Agt. and Atty. (L. S.)
SAMUEL KREISER, (L. S.)

The plaintiff's counsel argues that the lessee is estopped from denying the title of the landlord, and that the persons for whom Melcher is attorney and agent can not enforce the provisions of the lease, but that any action upon it must be brought in the name of the lessor as written in the instrument as signed, and, therefore, that the answer is both sham and frivolous. He cites the case of *Schaefer v. Henkel*, 75 N. Y. 378, in which the Court of Appeals held, Rapallo and Allen dissenting, that, where it distinctly appeared that the seal affixed was the seal of the person subscribing, even though he designated himself as agent, and not the seal of the principal, the agent is the real party in interest who can maintain an action on the agreement. But in that case the absence of proof that the lessee had knowledge that such agent was acting for the owners prevented the owners recovering upon the instrument.

He also cites the case of *Kiersted v. Orange R. R. Co.*, 69 N. Y. 343, where the Court of Appeals held that the agent executing the lease as lessee in his individual name was alone liable, as the lease did not purport to be executed on behalf of the principal.

There is also another case of similar import, namely, that of *Briggs v. Partridge*, 64 N. Y. 357. It was there held that an executory contract under seal for the purchase of lands, executed by the vendee in his own name, can not be enforced as a simple contract of another not mentioned in or a party to the instrument, on proof that the vendee named had oral authority from such other to make the contract, and did, in fact, act as his agent, in the absence of proof of the ratification on the part of the undisclosed principal.

The general doctrine, however, is that a mere agent or attorney, not having a beneficial interest in the contract, can not maintain an action in his own name. *Gunn v. Cantine*, 10 Johns. 387.

In *Dykers v. Townsend*, 24 N. Y. 57, the Court of Appeals allowed a recovery upon a contract, necessarily in writing to comply with the statute of frauds, by the principal or real party in interest, although the contract did not name or refer to the existence of the principal, and was apparently signed by the agent as a principal.

In *Miller v. Ball*, 64 N. Y. 286, there was an oral contract for the purchase of lands which was taken out of the statute of frauds by acts of improvement on the part of the vendee. The contract itself was made by the agent as a principal, and no suggestion whatever was

made as to any one but the apparent vendee having any interest whatever in the purchase. Yet the Court of Appeals allowed a specific performance of this contract by the undisclosed principal.

It will thus be seen that the only limitations upon the necessity of bringing the action in the name of the real party in interest are in cases where the agent makes the contract as a principal and affixes the seal as principal; even in those cases it would seem that the real party in interest ought to have the right to enforce an agreement actually made for his benefit, and under which he has been deprived of the use of his own property, and that he could terminate the agency when he saw fit in case of untrustworthiness of the agent, adopting the act of that agent for the enforcement of that contract itself and for his own protection.

However this may be, in the present case the lessor in the lease itself describes himself as attorney and agent for the owners, signs the lease as agent and attorney, showing that he was not covenanting in his own behalf, but professedly for others; and I am referred to no case which allows him upon such a written instrument to bring an action, not in his own name, but as attorney and agent for the owners, as plaintiff, and recover the sums provided to be paid by the party of the second part.

The answer clearly can not be stricken out as sham and frivolous independently of any consideration of the denial of the execution of any such writing, which ordinarily allows a trial of the question in issue before a jury.

*Motion denied, with \$10 costs.*¹

MELCHER. AS ATTORNEY AND AGENT FOR THE
OWNERS, *v.* KREISER.

SUPREME COURT OF NEW YORK, APPELLATE DIVISION,
APRIL TERM, 1898.

[28 *App. Div.* 362.]

Appeal by the plaintiff, John L. Melcher, as attorney and agent for the owners, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York, on the 12th day of January, 1898, upon the dismissal of the complaint by direction of the court after a trial at the New York Trial Term.

John S. Melcher, for the appellant.

Emanuel J. Myers, for the respondent.

RUMSEY, J.—The action was brought upon a lease under seal made between John L. Melcher, "as attorney and agent for the owners of the

¹ Affirmed in Appellate Division of the Supreme Court, without opinion, November Term, 1897, 22 *App. Div.* 629. But see *Melcher v. Kaiser* (1898), 28 *App. Div.* 362, given in the text, *infra*.—*Ed.*

premises hereinafter described, party of the first part, lessor, and Samuel Kreiser, of the said city, lessee, party of the second part." The paper was signed by John L. Melcher, agent and attorney. It provided for renting certain property for two months, from the nineteenth of November to the nineteenth of December, at \$400 a month. The complaint contained an allegation that the lease was continued from month to month, subject to all the terms and conditions of the lease, and that the defendant continued in possession of the premises, and was in possession at the time of the commencement of the action. It is alleged that the rent due on the 19th of April, 1897, and the 19th of May, 1897, was unpaid, except the sum of \$300, and that there was due to the plaintiff, by reason of the unpaid rent for these two months, the sum of \$500, for which judgment was demanded. The answer, omitting the formal parts, is as follows:

The defendant "denies the allegation contained in paragraph first of said complaint, and in folio 2 thereof, and further alleges that the plaintiff herein is not the real party in interest, but is merely the attorney or agent for the owners of the premises set forth in the complaint herein, and that the real parties in interest are, as defendant is informed and believes, Ellen S. Melcher and Mary Paget."

On these pleadings the case came to trial. The plaintiff proved the execution of the lease, that the defendant went into possession under it and continued in possession, and then rested. Thereupon the court dismissed the complaint on the ground that the action was not brought by the real party in interest, and that there was no rent due and unpaid. From the judgment entered upon that order of dismissal this appeal is taken. That the rent is due and unpaid is admitted by the failure to deny it in the answer. Indeed, the answer contains no denial whatever. The statement that it denies "the allegation contained in paragraphs first of said complaint, and in folio 2 thereof," amounts to nothing. It is utterly impossible to ascertain from an examination of the papers presented to us what portion of the complaint is in folio 2, paragraph 1st, because there is no such folio in the complaint. Such a pleading is entirely unwarranted and ineffectual, and is entitled to no weight whatever as a denial of anything. In the trial of this case the plaintiff might well have stood upon the allegations of the complaint, insisting that no part of it was denied by the answer. But even if paragraph 1st can be deemed to have been denied, the allegation that the rent was unpaid was contained in paragraph 3rd, as to which no mention was made, and, therefore, upon the record, there is no doubt that \$500 of rent was unpaid, as the plaintiff claimed. The making of the lease, and the fact that the defendant went into possession under it, and that the possession was continued by agreement between the parties from month to month, and that the defendant was in possession at the time of the commencement of the action, were all established by the evidence, as well as admitted by the pleadings.

Upon that state of undisputed facts the plaintiff was entitled to recover in this action, for various reasons. In the first place, as it appeared that the defendant entered into possession of the premises by virtue of his lease from the plaintiff, and remained in possession under that lease, he was estopped from denying the existence of the relation of landlord and tenant between himself and Melcher as attorney, and his liability to pay rent to Melcher as he had agreed to pay in his lease. *Tilyou v. Reynolds*, 108 N. Y. 558. This contract being under seal, and having been made by Melcher personally, although describing him by the word "agent," Melcher was the only party of the first part to this lease, and he, and not those persons for whom he might have been agent, was entitled to sue upon it.¹ If it can be inferred from this paper that Melcher made this contract for the benefit of other persons, still he is a person with whom or in whose name a contract is made for the benefit of another, and, therefore, is a trustee of an express trust, within section 449 of the Code of Civil Procedure, and by the provision of that section is entitled to maintain this action. *Considerant v. Brisbane*, 22 N. Y. 389. For all these reasons he was entitled to sue and should have recovered the judgment in the action.

The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., BARRETT, PATTERSON, and O'BRIEN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

¹*Schaefer v. Henkel*, 75 N. Y. 378; *Albany & Rens. Co. v. Lundberg*, 121 U. S. 451.

II. WHEN THE PARTY WITH WHOM THE CONTRACT IS MADE CONTRACTS OSTENSIBLY FOR THE BENEFIT OF A THIRD PERSON, STRANGER TO THE CONTRACT.

1. *The affirmative application of the rule in general.*

LAWRENCE v. FOX.

COURT OF APPEALS OF NEW YORK, DECEMBER, 1859.

[20 N Y. 268.]

Appeal from the Superior Court of the city of Buffalo.

On the trial before Mr. Justice Masten, it appeared, by the evidence of a bystander, that one Holly, in November, 1857, at the request of the defendant, loaned and advanced to him \$300, stating at the time that he owed that sum to the plaintiff for money borrowed of him, and had agreed to pay it to him the then next day; that the defendant in consideration thereof, at the time of receiving the money, promised to pay it to the plaintiff the then next day.

Upon this state of facts, the defendant moved for a nonsuit, upon three several grounds, viz.: That there was no proof tending to show that Holly was indebted to the plaintiff; that the agreement by the defendant with Holly to pay the plaintiff was void for want of consideration; and that there was no privity between the plaintiff and the defendant. The court overruled the motion, and counsel for the defendant excepted.

The cause was then submitted to the jury, and they found a verdict for the plaintiff for the amount of the loan and interest, \$344.66, upon which judgment was entered. The defendant appealed to the Superior Court, at general term, where the judgment was affirmed; the defendant then appealed to this court.

I. S. Torrance, for the appellant.

E. P. Chapin, for the plaintiff.

H. GRAY, J.—The first objection raised on the trial amounts to this: That the evidence of the person present, who heard the declarations of Holly giving directions as to the payment of the money he was then advancing to the defendant, was mere hearsay and therefore not competent. Had the plaintiff sued Holly for that sum of money no objection to the competency of this evidence would have been thought of; and if the defendant had performed his promise by paying the sum loaned to him to the plaintiff, and Holly had afterward sued him for its recovery, and this evidence had been offered by the defendant, it would doubtless have been received without an objection from any source. All

the defendant had the right to demand in this case was evidence which, as between Holly and the plaintiff, was competent to establish the relation between them of debtor and creditor. For that purpose the evidence was clearly competent; it covered the whole ground and warranted the verdict of the jury.

But it is claimed that notwithstanding this promise was established by competent evidence, it was void for the want of consideration. It is now more than a quarter of a century since it was settled by the Supreme Court of this State—in an able and painstaking opinion by the late Chief Justice Savage, in which the authorities were fully examined and carefully analysed—that a promise in all material respects like the one under consideration was valid; and the judgment of that court was unanimously affirmed by the Court for the Correction of Errors. *Farley v. Cleaveland*, 4 Cow., 432; same case in error, 9 *id.* 639. In that case one Moon owed Farley and sold to Cleaveland a quantity of hay, in consideration of which Cleaveland promised to pay Moon's debt to Farley; and the decision in favor of Farley's right to recover was placed upon the ground that the hay received by Cleaveland from Moon was a valid consideration for Cleaveland's promise to pay Farley, and that the subsisting liability of Moon to pay Farley was no objection to the recovery. The fact that the money advanced by Holly to the defendant was a loan to him for a day, and that it thereby became the property of the defendant, seemed to impress the defendant's counsel with the idea that because the defendant's promise was not a trust fund placed by the plaintiff in the defendant's hands, out of which he was to realize money as from the sale of a chattel or the collection of a debt, the promise although made for the benefit of the plaintiff could not enure to his benefit. The hay which Cleaveland delivered to Moon was not to be paid to Farley, but the debt incurred by Cleaveland for the purchase of hay, like the debt incurred by the defendant for money borrowed, was what was to be paid. That case has often been referred to by the courts of this State, and has never been doubted as sound authority for the principle upheld by it. *Barker v. Buklin* [1846], 2 Denio, 45; *Hudson Canal Company v. The Westchester Bank* [1847], 4 *id.* 97. It puts to rest the objection that the defendant's promise was void for want of consideration.

The report of that case shows that the promise was not only made to Moon but to the plaintiff Farley. In this case the promise was made to Holly and not expressly to the plaintiff; and this difference between the two cases presents the question, raised by the defendant's objection, as to the want of privity between the plaintiff and the defendant.

As early as 1806 it was announced by the Supreme Court of this State, upon what was then regarded as the settled law of England, "that where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it." *Schemerhorn v. Vanderheyden* [1806], 1 John. R., 140, has often been

re-asserted by our courts and never departed from. The case of *Seaman v. White*,¹ has occasionally been referred to (but not by the courts) not only as having some bearing upon the question now under consideration, but as involving in doubt the soundness of the proposition stated in *Schemerhorn v. Vanderheyden*. In that case one Hill, on the 17th of August, 1835, made his note and procured it to be indorsed by Seaman and discounted by the Phoenix Bank. Before the note matured and while it was owned by the Phoenix Bank, Hill placed in the hands of the defendant, Whitney, his draft accepted by a third party, which the defendant indorsed, and on the 7th of October, 1835, got discounted and placed the avails in the hands of an agent with which to take up Hill's note; the note became due, Whitney withdrew the avails of the draft from the hands of his agent and appropriated it to a debt due him from Hill, and Seaman paid the note indorsed by him and brought his suit against Whitney. Upon this state of facts appearing, it was held that Seaman could not recover: *first*, for the reason that no promise had been made by Whitney to pay; and, *second*, if a promise could be implied from the facts that Hill's accepted draft, with which to raise the means to pay the note, had been placed by Hill in the hands of Whitney, the promise would not be to Seaman, but to the Phoenix Bank, who then owned the note; although, in the course of the opinion of the court, it was stated that, in all cases, the principle of which was sought to be applied to that case, the fund had been appropriated by an express undertaking of the defendant with the creditor. But before concluding the opinion of the court in this case, the learned judge who delivered it conceded that an undertaking to pay the creditor may be implied from an arrangement to that effect between the defendant and the debtor.

This question was subsequently, and in a case quite recent, again the subject of consideration by the Supreme Court, when it was held, that in declaring upon a promise, made to the debtor by a third party to pay the creditor of the debtor, founded upon a consideration advanced by the debtor, it was unnecessary to aver a promise to the creditor; for the reason that upon proof of a promise made to the debtor to pay the creditor a promise to the creditor would be implied. And in support of this proposition, in no respect distinguishable from the one now under consideration, the case of *Schemerhorn v. Vanderheyden*, with many intermediate cases in our courts, were cited, in which the doctrine of that case was not only approved but affirmed. *The Delaware and Hudson Canal Company v. The Westchester County Bank* [1847], 4 Denio, 97.

The same principle is adjudged in several cases in Massachusetts. I will refer to but few of them. *Arnold v. Lyman* [1821], 17 Mass., 400; *Hall v. Marston* [1822], *id.*, 575; *Brewer v. Dyer* [1851], 7 Cush., 337,

¹ Reported, under title *Seaman v. Whitney*, 24 Wend. 260 [1840].—Ed.

340. In *Hall v. Marston*, the court say: "It seems to have been well settled that if A promises B for a valuable consideration to pay C, the latter may maintain *assumpsit* for the money;" and in *Brewer v. Dyer*, the recovery was upheld, as the court said, "upon the principle of law long recognized and clearly established, that when one person, for a valuable consideration, engages with another, by a simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement; that it does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases would seem to indicate, but upon the broader and more satisfactory basis, that the law operating on the act of the parties creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded."

There is a more recent case decided by the same court, to which the defendant has referred and claims that it at least impairs the force of the former cases as authority. It is the case of *Mellen v. Whipple* [1854], 1 Gray, 317. In that case one Rollins made his note for \$500, payable to Ellis and Mayo, or order, and to secure its payment mortgaged to the payees a certain lot of ground, and then sold and conveyed the mortgaged premises to the defendant, by deed in which it was stated that the

"granted premises were subject to a mortgage for \$500, which mortgage, with the note for which it was given, the said Whipple is to assume and cancel."

The deed thus made was accepted by Whipple, the mortgage was afterwards duly assigned, and the note indorsed by Ellis and Mayo to the plaintiff's intestate. After Whipple received the deed he paid to the mortgagees and their assigns the interest upon the mortgage and note for a time, and upon refusing to continue his payments was sued by the plaintiff as administratrix of the assignee of the mortgage and note. The court held that the stipulation in the deed that Whipple should pay the mortgage and note was a matter exclusively between the two parties to the deed; that the sale by Rollins of the equity of the redemption did not lessen the plaintiff's security; and that as nothing had been put into the defendant's hand for the purpose of meeting the plaintiff's claim on Rollins, there was no consideration to support an express promise, much less an implied one, that Whipple should pay Mellen the amount of the note. This is all that was decided in that case, and the substance of the reasons assigned for the decision; and whether the case was rightly disposed of or not, it has not in its facts any analogy to the case before us, nor do the reasons assigned for the decision bear in any degree upon the question we are now considering.¹

But it is urged that because the defendant was not in any sense a trustee of the property of Holly for the benefit of the plaintiff, the law

¹ See the later Massachusetts cases, given in note at the end of *Lawrence v. Fox*.—Ed.

will not imply a promise. I agree that many of the cases where a promise was implied were cases of trusts, created for the benefit of the promisor. The case of *Felton v. Dickinson*, 10 Mass. [1813], 287, 290, and others that might be cited, are of that class; but concede them all to have been cases of trusts, and it proves nothing against the application of the rule to this case. The duty of the trustee to pay the *cestuis que trust*, according to the terms of the trust, implies his promise to the latter to do so. In this case, the defendant upon ample consideration received from Holly, promised Holly to pay his debt to the plaintiff; the consideration received and the promise to Holly made it as plainly his duty to pay the plaintiff as if the money had been remitted to him for that purpose, and as well implied a promise to do so as if he had been made a trustee of property to be converted into cash with which to pay. The fact that a breach of the duty imposed in the one case may be visited, and justly, with more serious consequences than in the other, by no means disproves the payment to be a duty in both. The principle illustrated by the example so frequently quoted (which concisely states the case in hand) "that a promise made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach," has been applied to trust cases, not because it was exclusively applicable to those cases, but because it was a principle of law, and as such applicable to those cases.

It was also insisted that Holly could have discharged the defendant from his promise, though it was intended by both parties for the benefit of the plaintiff, and therefore the plaintiff was not entitled to maintain this suit for the recovery of a demand over which he had no control. It is enough that the plaintiff did not release the defendant from his promise and whether he could or not is a question not now necessarily involved; but if it was, I think it would be found difficult to maintain the right of Holly to discharge a judgment recovered by the plaintiff upon confession or otherwise, for the breach of the defendant's promise; and if he could not, how could he discharge the suit before judgment, or the promise before suit, made as it was for the plaintiff's benefit and in accordance with legal presumption accepted by him (*Berly v. Taylor*, [1843], 5 Hill, 577—584, *et seq.*), until his dissent was shown. The cases cited, and especially that of *Farley v. Cleaveland*, establish the validity of a parol promise; it stands then upon the footing of a written one. Suppose the defendant had given his note in which, for value received of Holly, he had promised to pay the plaintiff and the plaintiff had accepted the promise, retaining Holly's liability. Very clearly Holly could not have discharged that promise, be the right to release the defendant as it may. No one can doubt that he owes the sum of money demanded of him, or that in accordance with his promise it was his duty to have paid it to the plaintiff; nor can it be doubted that whatever may be the diversity of opinion elsewhere, the adjudications in this State, from a very early period, approved by experience, have

established the defendant's liability; if, therefore, it could be shown that a more strict and technically accurate application of the rules applied, would lead to a different result (which I by no means concede), the effort should not be made in the face of manifest justice.

The judgment should be affirmed.

JOHNSON, Ch. J., DENIO, SELDEN, ALLEN, and STRONG, JJ., concurred. JOHNSON, Ch. J., and DENIO, J., were of opinion that the promise was to be regarded as made to the plaintiff through the medium of his agent, whose action he could ratify when it came to his knowledge, though taken without his being privy thereto.

COMSTOCK and GROVER, JJ., dissented.¹

*Judgment affirmed.*²

¹"The plaintiff," said Comstock, J., in his dissenting opinion, "had nothing to do with the promise on which he brought this action. It was not made to him, nor did the consideration proceed from him. If he can maintain the suit, it is because an anomaly has found its way into the law on this subject. In general, there must be privity of contract. The party who sues upon a promise must be the promisee, or he must have some legal interest in the undertaking. In this case, it is plain that Holly, who loaned the money to the defendant, and to whom the promise in question was made, could at any time have claimed that it should be performed to himself personally. He had lent the money to the defendant, and at the same time directed the latter to pay the sum to the plaintiff. This direction he could countermand, and if he had done so manifestly the defendant's promise to pay according to the direction would have ceased to exist. The plaintiff would receive a benefit by a complete execution of the arrangement, but the arrangement itself was between other parties, and was under their exclusive control. If the defendant had paid the money to Holly, his debt would have been discharged thereby. So Holly might have released the demand or assigned it to another person, or the parties might have annulled the promise now in question, and designated some other creditor of Holly as the party to whom the money should be paid. It has never been claimed that in a case thus situated, the right of a third person to sue on a promise rested on any sound principle of law. We are to inquire whether the rule has been so established by positive authority."

After reviewing a considerable number of cases, English and American, Judge Comstock adopted the opinion of Metcalf, J., in *Mellen v. Whipple* (1854), 1 Gray, 317, "that the cases which had been supposed to favor the action belonged to exceptional classes, none of which embraced the pure and simple attempt by one person to enforce a promise made to another from whom the consideration wholly proceeded."

²CASES FOR AND AGAINST THE GENERAL DOCTRINE OF LAWRENCE V. FOX.

Accord, with the majority ruling: *Mason v. Hall* (1857), 30 Ala. 599. [A. hires a slave to B. for a year for \$155. Afterwards within the year, B. hires the slave to C. who promises B. that he (C.) will pay A. \$150 of the \$155.] *Sanders v. Clason* (1868), 13 Minn. 379. [A firm being indebted to B. and various other persons, sold and delivered to C. all the firm's stock in trade. In consideration thereof, C. agreed with the firm to pay certain of their debts, among them the debt due B. "The question is, whether the plaintiff (B.) can avail himself of this promise by maintaining an action upon it in his own name. If he can the other averments, as to the promise being directly to him, will be mere surplusage."] *Meyer v. Lowell* (1869), 44 Mo. 328. *Morgan v. Overman Silver Mining Co.* (1869), 37 Cal. 534. *White v. Hunt* (1870), 64 N. C. 496; but see *Woodcock v. Bostic* (1896), 118 N. C. 822, 827. *Johnson v. Knapp* (1873), 35 Iowa, 616. [A. sold a mare to B. who agreed with A., as part of the contract, to pay to C. \$30 which A. owed to C. for the services of a stallion if the mare proved with foal.] *Jordan v. White* (1873), 20 Minn. 91. [A. conveyed a 40 acre tract to B. (the plaintiff). Afterwards, before B.'s deed was recorded, A., without B.'s knowledge, mortgaged this tract and the adjoining 120 acres to C. On foreclosure, C. bought in the 160 acres. Afterwards, before the time for redemption had expired, A., by warranty deed, conveyed all but the 40 acres to D. (the defendant), who in consideration thereof, agreed with A. to pay off the lien created by the mortgage to C. on the 40 acres conveyed to A. D. suffered the redemption period to expire, and the title of the 160 acres to become absolute in C.; but afterwards D. acquired from C. the legal title to the 160 acres.] *Rogers v. Gosnell* (1875), 58 Mo. 589. *Car* 29

Zeublin (1879), 68 Ind. 436. *Follansbee v. Johnson* (1881), 28 Minn. 311. *Starika v. Greenwood* (1881), 28 Minn. 521. *Smith v. Flack* (1883), 95 Ind. 116. *Hecht & Imboden v. Caughron* (1885), 46 Ark. 132. *Shamp v. Meyer* (1886), 20 Neb. 223. *Johannes v. Phenix Ins. Co.* (1886), 66 Wis. 50. [The plaintiff was a policy holder in a fire insurance company whose risks had been reinsured by the defendant.] *Kaufman v. U. S. National Bank* (1891), 31 Neb. 667. *Stevens v. Flannagan* (1891), 131 Ind. 122, 129: "Before the adoption of the code, when law and equity were administered by separate tribunals, privity of contract was essential to the maintenance of an action at law, but in equity a promise of one person to another for the benefit of a third could be enforced by the latter in his own name. Under our present practice the right of the third person to maintain his action in his own name has been uniformly recognized. *Carnahan v. Tousey*, 93 Ind. 561, with authorities there cited; *Leake v. Ball*, 116 Ind. 214, and many other cases. . . . The law recognizes the right of the beneficiaries to demand performance without the formality of any delivery of the contract to them. In equity they are its holders without that formality, and, as such, they are also possessed of the equitable right to have the vendor's lien declared and enforced."—*Per* McBRIDE, J. *Davis v. National Bank of Commerce* (1895), 45 Neb. 589: When one has received a conveyance of certain property in consideration of which he absolutely agrees to pay a certain debt of his grantor, it is no defence to a suit brought by this creditor that he has already sued the grantor, and issued an attachment against the property conveyed as being still the property of the grantor.

Contra: *Exchange Bank v. Rice* (1871), 107 Mass. 37: "The general rule of law is, that a person who is not a party to a simple contract, and from whom no consideration moves, can not sue on the contract, and consequently, that a promise made by one person to another for the benefit of a third person who is a stranger to the consideration, will not support an action by the latter. And the recent decisions in this Commonwealth and in England have tended to uphold the rule and to narrow the exceptions to it."—*Per* GRAY, J. (p. 41). *Morrill v. Lane* (1883), 136 Mass. 93: "It is well settled in this Commonwealth that a promise made by A. to B. [who has assigned certain goods to A. to pay the amount owed by B. to his employees for labor on the goods] that A. will pay unspecified amounts of money to various persons not named, but described generally as of a certain class, will not support an action by one of those persons against A. . . . This is also the law of England. Pollock on Contracts (3rd ed.) 203—207. This case does not fall within the decision in *Frost v. Gage* (1861), 1 Allen 262, where there was a trust and the action was by the *cestui que trust* against the trustee. Such a relation does not form a simple promise by A. to B. for the benefit of C. and others. *In re Empress Engineering Co.* (1880), 16 Ch. D. 125. Upon the facts found, we are not at liberty to assume, without the defendant's assent, that the defendants understood that the plaintiff was included in the class to be paid; and it is doubtful, to say the least, if such assumption would extricate the plaintiff's case from the general rule."—*Per* C. ALLEN, J., citing *Tweedle v. Atkinson*, 1 B. & D. 393; *In re Empress Engineering Co.*, 16 Ch. D. 125; *National Bank v. Grand Lodge*, 98 U. S. 123, given in text, *infra*; *Leake* on Con. 440, 443, 444; Ch. t. Con. (11th Am. ed.) 74, 75; Dicey on Parties, 78—84.

So also, *Borden v. Boardman* (1892), 157 Mass. 410: "The case, reduced to its simplest form, is one of an agreement between two parties, upon sufficient consideration, it may be, between them, that one will pay, out of funds in his hands belonging to the other, a specific sum to a third person, who is not a party to the agreement, and from whom no consideration moves. It is well settled in this State that no action lies in such a case in favor of such third party to recover the money so held of the party holding it. . . . Certain exceptions which were supposed to exist have either been shown not to exist, or have been confined within narrower limits. *Exchange Bank v. Rice*, 107 Mass. 37; *Marston v. Bigelow*, 150 Mass. 45. We have assumed that the sum which the defendant agreed to pay the plaintiff was specific."—*Per* MORTON, J., (412—413). See also *White v. Mount Pleasant Mills Corp.* (1899), 172 Mass. 462. For statutory modifications of the Massachusetts doctrine, see *Dean v. American Legion of Honor* (1892), 156 Mass. 435; *Brierly v. Equitable Aid Union* (1898), 170 Mass. 218.

Contra also: *Butterfield v. Hartshorn* (1834), 7 N. H. 345; but see *Lang v. Henry* (1873), 54 N. H. 57, 63. *McCarleney v. Wyoming National Bank* (1875), 1 Wyo. 382 (where the contract was under seal).

For a typical change of doctrine from that of these Massachusetts cases to that recognized in *Lawrence v. Fox*, see *Harvey Lumber Co. v. Herriman & Curd Lumber Co.* (1890), 39 Mo. App. 214, given in the text, *infra*. See also *Ellis v. Harrison* (1891), 104 Mo. 270: "In Missouri, a person for whose benefit an express promise is made, in a valid contract between others, may maintain an action upon it in his own name. This proposition is now too firmly settled as part of the law of this State to require re-examination. Whether it is logically deducible from common-law principles (as has been sometimes doubted) it would

serve no useful purpose now to consider. It has been accepted here, as in most of the American States, because it is supposed to furnish a useful rule in practice, tending to simplify litigation. By following it one action often effects the same result that two would be required to accomplish without it.

"Moreover by our code of procedure, it is provided that every action shall be prosecuted in the name of the real party in interest, with certain exceptions, one of which is that the trustee of an express trust may sue in his own name. The statute then declares that such a trustee 'shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.' R. S. 1889, secs. 1990, 1991. Reading these sections together, it would seem to be clearly implied that the beneficiary in such a contract is to be regarded as a real party in interest, and that, as such, he may sue thereon in his own name; while, on the other hand, the contracting party (as trustee of an express trust, within the statutory definition) may likewise maintain an action on the same contract."—*PER BARCLAY, J.*, (p. 277).

See also *Sacramento Lumber Company v. Wagner* [1885], 67 Cal. 293, 295, where BELCHER, C. C., delivering the opinion, remarks: "It is claimed that the debt was the obligation of John Wagner, and that a promise made to John Wagner or Michael Wagner could not operate as a promise to the plaintiff, or to Hartwell, Hotchkiss & Stalker, on which they could sue, for the reason that there was no privity between the parties.

"The same point was made and maintained in *McLaren v. Hutchinson*, 18 Cal. 80. The Court said: 'In this case the defendant purchased of one Beach a tract of land, and as a part of the consideration agreed to pay certain debts specified in the complaint. Neither the plaintiff nor any of the persons to whom the debts were owing were parties to the agreement, and it does not appear that they ever assented to or attempted in any manner to connect themselves with the transaction prior to the commencement of the suit. The plaintiff is the present holder of these debts, and the question is whether he can maintain an action against the defendant for their recovery. It is clear, we think, that he cannot. There is no privity between the parties and the legal position of the plaintiff is that of a stranger to the agreement.'

"The same point was again made in *Lewis v. Covillaud*, 21 Cal. 189, and speaking of *McLaren v. Hutchinson*, the Court said: 'In that case the suit was upon an agreement made by the defendant with a third person to pay a debt owing by the latter to the plaintiff, and we held, that as the plaintiff was not a party to the agreement, the action could not be maintained. The decision was placed upon the ground that there was no privity; but since the case was decided, the matter has frequently been called to our attention, and we are by no means satisfied with the rule laid down. The agreement was founded upon a sufficient consideration, and the modern doctrine in such cases seems to be in favor of the maintenance of the action.'

"We are satisfied that an action like that described in *McLaren v. Hutchinson* may be maintained, and that the court did not err in this case in rendering judgment in favor of the plaintiff. (*Barker v. Bucklin*, 2 Denio, 45; *Delaware and Hudson Canal Co. v. Westchester Co. Bank*, 4 Denio, 97; *Lawrence v. Fox*, 20 N. Y. 268; *Turk v. Ridge*, 41 N. Y. 206; *Barker v. Bradley*, 42 N. Y. 316; *Arnold v. Lyman*, 17 Mass. 400; 9 Am. Dec 154)."

To the same effect are *Malone v. Crescent City Mill and Transportation Company* (1888), 77 Cal. 38, 44; *Chung Kee v. Davidson* (1894), 102 Cal. 188, 197.—*Ed.*

Burr v. Beers.

COURT OF APPEALS OF NEW YORK, DECEMBER, 1861.

[24 N. Y. 178.]

Appeal from a judgment of the Supreme Court in favor of the plaintiff.

The action was brought to recover the amount of two mortgages executed, with his bonds, by E. F. Bullard to John Cramer, committee of the estate of Charles Burr (the plaintiff's intestate), for \$1,000 and \$2,000 respectively. After giving the mortgages, which covered several parcels of lands, Bullard conveyed both parcels to the defendants by a deed containing a recital and covenant in the following words:

"Subject to two mortgages held by John Cramer, committee of the estate of Charles Burr, bearing date, &c. (*describing the mortgages*), which mortgages are deemed and taken as a part of the consideration of this conveyance, and which the party of the second part hereby assumes to pay."

Charles Burr was restored to the possession and control of his estate by an order of the Supreme Court; and he prosecuted this suit to judgment, but died pending this appeal. The action was continued in the name of the plaintiff as his administratrix.

The plaintiff on the trial proved the actual delivery of the deed by Bullard, to the defendant. The defendant objected that there was no privity of contract between him and the plaintiff; but the justice (before whom the case was tried without a jury) held otherwise. Judgment was given for the plaintiff for the amount of the mortgages, which was affirmed at a general term, and the defendant appealed to this court.

J. D. Beers, for the appellant.

E. F. Bullard, for the respondent.

DENIO, J.—If the plaintiff had sought to foreclose the mortgages in question, and to charge the defendant with the deficiency which might remain after applying the proceeds of the sale, and had made both the mortgagor and the present defendant parties, the authorities would be abundant to sustain the action in both aspects.¹ But I do not understand that the right to a personal judgment for the deficiency is based upon the notion of a direct contract between the grantee of the equity of redemption, and the holder of the mortgage. The cases proceed upon the principle that the undertaking of the grantee to pay off the incumbrance is a collateral security acquired by the mortgagor, which inures by an equitable subrogation to the benefit of the mortgagee. Then the statute relating to foreclosures provides that if the mortgage debt be

¹ *Citing*, *Curtis v. Tyler*, 9 Paige, 432; *Halsey v. Reed*, *id.*, 446; *March v. Pike*, 10 *id.*, 595; *Blyer v. Monholland*, 2 Sandf. Ch. R., 478; *King v. Whitely*, 10 Paige, 465; *Trotter v. Hughes*, 2 Kern., 74; *Vail v. Foster*, 4 Comst., 312; *Belmont v. Coman*, 22 N. Y., 438.

secured by the obligation or other evidence of debt executed by any other person besides the mortgagor, such person may be made a defendant, and may be decreed to pay the deficiency. 2 R. S., p. 191, § 154. Chancellor WALWORTH puts the right to a personal judgment in such a case, upon the equity of this statute,¹ and Vice-Chancellor SANDFORD expressly says, that the obligation is not enforced as being made by the grantee of the equity of redemption under such a deed, to the mortgagee, but as a promise by the former to the mortgagor, to pay him the amount of the mortgage; by paying it to the mortgagee in payment of his debt, which promise the mortgagee is equitably entitled to lay hold of and enforce under the equity of the statute referred to.²

It is obvious, that the judgment of the Supreme Court in the present case can not be sustained upon the doctrine referred to. The plaintiff does not ask to foreclose the mortgage and does not make the principal debtor Bullard, a party. If the judgment can be supported at all, it must be upon the broad principle that if one person make a promise to another, for the benefit of a third person, that third person may maintain an action on the promise.

Upon that question there has been a good deal of conflict of judicial opinion. As long ago as 1817, Chancellor KENT laid it down as a point decided, and referred to not less than eight English and American cases, as sustaining the principle.³ And since then it has been frequently affirmed by judges, after an attentive examination of cases, as in *Barker v. Bucklin*, 2 Denio, 45, and in cases therein referred to. These cases, and also those referred to by Chancellor KENT, are doubtless subject to some of the criticisms which have since been applied to them. Some of the opinions were pure *obiter dicta*, and in others, the cases though presenting the point were decided upon other grounds. It can not however be denied, that the doctrine had been so often asserted, that it had become the prevailing opinion of the profession, that an action would lie in such a case in the name of the creditor, for whose benefit the promise was made. Finally the question came squarely before the court in *Lawrence v. Fox*, 20 N. Y., 268, and we held, with hesitation on the part of a portion of the judges who concurred, while others dissented, that the action would lie. We must therefore regard the point as definitely settled, so far as the courts of this State are concerned.

The judgment appealed from being in accordance with the law as adjudged in that case, must be affirmed.

LORR, J., also delivered an opinion for affirmance, and all the judges concurred.

*Judgment affirmed.*⁴

¹ *Curtis v. Tyler* (1842), 9 Paige, 432, 435.

² *Blyer v. Munholland* (1845), 2 Sandf. Ch. 478, 480.

³ *Citing, Cumberland v. Codrington*, 3 J. C. R. 255.

⁴ See *Thompson v. Bertram* (1863), 14 Iowa, 476. *Helms v. Kearns* (1872), 40 Ind. 124. *Anthony v. Herman* (1875), 14 Kan. 494. *Bowen v. Beck* (1883), 94 N. Y. 86. *Warren v. Wilder* (1889), 114 N. Y. 209. *Williams v. Naftzger* (1894), 103 Cal. 438. *Green v. Morrison*

RICE v. SAVERY.

SUPREME COURT OF IOWA, JUNE TERM, 1867.

[22 Iowa, 470.]

The plaintiff appeals from an order of this District Court, sustaining a demurrer to his petition.

The petition and accompanying exhibits show the following facts: On the 9th day of May, 1856, certain citizens of Fort Des Moines, now the City of Des Moines, signed a written instrument, as follows:

"Whereas, we deem it desirable that a spacious hotel shall be erected and kept in the town of Fort Des Moines, and whereas it is suggested that such a hotel will be so erected and kept, provided a loan of money is made for that purpose at ten per cent interest per annum:—

"Now we do severally agree with each other that we will become subscribers to such loan, to the amount of the several sums set against our respective names,

(1879), 5 Colo. 18. [P. sues D. upon his promissory note. D. admits the making of the note and that it is due, but sets up that one S., being indebted to D., had mortgaged certain lands to him, and afterwards, before maturity of the mortgage, had conveyed this land to P., upon his promise to S. to pay the latter's debt to D. under the mortgage.]

Compare *Josselyn v. Edwards* (1877), 57 Ind. 212: "A tract of real estate which was encumbered by a mortgage executed by the owner to another, to secure the payment of a promissory note for a certain sum, waiving valuation laws and stipulating for attorney fees, was conveyed by the owner to a third person by a deed, which, particularly describing such encumbrance, provided that the grantee, as part of the consideration for such conveyance, should assume and pay the same at maturity, 'in accordance with the terms thereof.' Such grantee having made default in such payment, his grantor paid off the same and brought an action against the grantee to recover the same. Held, that the plaintiff, being himself bound for such debt to the mortgagee, by paying off the same, became subrogated to the rights of the latter, and was entitled to a judgment for the amount of such note, waiving valuation laws and including attorney fees, and to have foreclosure of such mortgage. Held, also, that, as between the defendant and the plaintiff, their relations became, by such contract of conveyance, that of principal and surety respectively on such debt.

See also, *Thompson Adm. v. Thompson et al.* (1854), 4 O. S. 333, 350: "It seems to be a well settled principle, that the purchaser of an encumbered estate, if he agree to take it subject to the incumbrance, and an abatement is made in the price on that account, is bound to indemnify his grantor against the incumbrance, whether he expressly promises to do so or not—a promise to that effect being implied from the nature of the transaction."—*Per THURMAN, C. J.*

In *Dingeldein v. Third Avenue R. R. Co.* (1868), 37 N. Y. 575, 577, HUNT, C. J., remarks: "Two principles applicable to this case, must now be deemed as settled: First, that in a contract between A. and B., wherein B. assumes and undertakes, upon a good consideration from A., to pay a certain sum of money to C., the latter may maintain an action against B. to recover the money, and this, although the arrangement was originally made without his knowledge or assent. This principle has been established both where personal property was the subject of the contract, and where real estate was conveyed, upon which there was a mortgage, the amount of which the grantee promised that he would pay to the mortgagee. (*Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 N. Y. 178; *Hartley v. Harrison*, *id.* 171; *Russell v. Pictor*, 3 Seld. 171). Secondly, that where land is conveyed simply 'subject to a mortgage,' and there is no express agreement to pay, no agreement will be implied; and no action involving a personal liability can be maintained by the mortgagee against the buyer. (*Belmont v. Coman*, 22 N. Y. 438.)

"The plaintiff bases his claim upon the first of these principles; the defendants resist it

and that we will pay the full amount of the same over to our attorney herein-after named, and authorize their collection by process of law ; severally binding ourselves to comply with the conditions herein expressed. And we do hereby irrevocably constitute and appoint R. W. Sypher, B. F. Allen and Lovell White our lawful attorneys in fact, with power to appoint successors in case of death or resignation, for us and in our behalf to act and do for us in all things pertaining to said loan, with power to do all things in relation thereto that we might do if present, and especially to make a loan for the purpose aforesaid to the full amount of the aggregate of our subscriptions, to any person they may deem suitable on the terms following, viz : Said loan to be without interest until the occupancy of some part of said hotel, thence, interest at ten per cent per annum, the principal to be repaid in five equal annual payments, the first, in two years from said occupation. And we further authorize our said attorneys to take such security for said loan, and in such manner as they may deem satisfactory, and to contract for the building of a hotel, and to collect our subscriptions at such times and in such sums as may be required for the speedy completion of said hotel.

Signed,

" WHITE & HENRY, ... \$4,000.
 " COOK, SARGENT & COOK, . . . 1,000.
 " THOMPSON BIRD, ... 2,000."

To this document there were many other signatures, on the same day, the subscriptions thus made amounting in all to about \$40,000.

On the same day, May 9, 1856, the said Sypher, Allen and White entered into a written contract with James C. Savery, the defendant, in substance as follows :

" This contract, made between R. W. Sypher, B. F. Allen and Lovell White, as attorneys for Thomas Bird and others of the first part, and James C. Savery of the second part, witnesseth,

" That, whereas the said Bird and others have this day entered into an agreement to and with each other, to make a loan to the said Savery, to secure the

upon the second. If the article of transfer of October 8, 1853, may fairly be held to contain a promise to pay the plaintiff's debt, he may recover upon it. If not, he must fail or seek some other ground.

" In the case of *Belmont v. Coman* (*supra*), it was held that the transaction amounted simply to a conveyance of the equity of redemption of the land. The deed contained full covenants, and the recital of the mortgages was to qualify simply the grantor's liability on his covenants. The conveyance of the land, with its liability to the incumbrances specified, was the evident and sole intention of the parties. The deed containing no express promise to pay the liens, it was held, and rightly, that none should be implied.

" In the present case the language of the instrument and the intent of the parties are different. Here was no encumbrance on the property conveyed. The contract to indemnify the builder of the sewer was merely the personal obligation of the partnership and was not a lien upon the property conveyed. The intent to qualify a liability arising from such lien upon the property conveyed, could not, therefore, exist. The only conceivable intent with which this sewer contract was thus referred to, was to furnish the evidence that the new company would pay to Dingeldein the amount which the partnership was bound to pay, under the resolution referred to. The fact that in *Belmont v. Coman* the words were necessary to qualify the grantor's liability, and that here there was no such occasion, gives a different rule for the construction of the words in the two cases." See further, *Society of Friends v. Haines* (1890), 47 O. S. 423, holding that an agreement by a vendee of land, receiving title by a quit claim deed, made with the grantor, as part of the consideration of the transfer, to assume and pay the grantor's debt received by mortgage

erection of a building for a hotel on Lots 11 and 12, Block 21, Fort Des Moines, and have become subscribers for various sums to said loan, and have appointed said Sypher, Allen and White their attorneys, to act for them :

Now, therefore, the said parties of the first part, as said attorneys, in consideration of the covenants of said Savery, agree as follows : That they will loan Savery all money which may be paid to them on said subscription, on the following terms [the same as the foregoing instrument] and pay it to him as it may be needed to pay for labor or material in said building. That they will use all means in their power to enforce collections of the subscriptions. In consideration of which Savery agrees:

"That he will build a hotel on said lots on or before July, 1858. That he will receive as a loan from said attorneys all money subscribed and paid to them, and faithfully apply to the erection of said building, which shall be used as a hotel while the loan herein mentioned is outstanding. Said White is to be the treasurer of said board of attorneys, to whom application for money is to be made by the said Savery.

Signed,

"R. W. SYPHER,

"B. F. ALLEN,

"LOVELL WHITE,

"J. C. SAVERY."

On the 9th day of May, 1856, the said defendant executed and delivered to the said attorneys the following note or instrument for \$60,000, viz:

"\$60,000. One day after date, for value received, I promise to pay to the order of Reuben W. Sypher, Benjiman F. Allen and Lovell White, sixty thousand dollars. The conditions of this note are as follows, to wit: Whereas the said Sypher, Allen and White, as attorneys, have this day made and concluded certain articles of agreement with the undersigned, James C. Savery, by which they are to loan him money to secure the erection and furnishing of a hotel in Fort Des Moines: Now, therefore, if the said Savery, his heirs or assigns, shall well and truly repay to said Sypher, Allen, and White all money by them advanced to him or paid to his order, or on his account, for which they hold his check or receipt, or of the payment of which they may have other proof, in five equal annual payments, the first of which is to be made in two years from the occupation of the building said Savery is to erect, with interest on the same from and after said occupation, at ten per cent per annum, payable annually, then this note to be void, otherwise of full force and virtue. J. C. SAVERY."

On the same 9th day of May, the said Savery and wife executed to one Bradshaw, as trustee, a deed of trust on said lots eleven and twelve, block twenty-one, to secure the above copied instrument for \$60,000.

The plaintiff's assignors, Green, Weare & Rice, at defendant's solicitation, became subscribers to said loan to the amount of \$500, which

on the land may be enforced by the mortgagee, although such contract is not embodied in the deed; that such contract is not necessarily invalid because not in writing; that although executed by a married woman in 1883, it may be enforced against her by the mortgagee if it is shown that she has separate estate, that the transaction out of which the contract grew had reference to owners for the benefit of their separate estate, and that she intended to charge this estate with its payment; and that it is not error, in such a case, to render a personal judgment against her.—*Ed.*

sum they paid to said attorneys, and which plaintiff alleges was paid over by the attorneys to the defendant. On the 23d day of April, 1857, the said Green, Weare & Rice received from the directors of said loan the following certificate of stock :

"\$500 Certificate of Stock, Savery Hotel Loan No. 14.

"It is hereby certified that Green, Weare & Rice, having paid the full amount of their subscription to the Savery Hotel Loan, are the owners therein of five hundred dollars, being the amount so paid. This certificate being the evidence thereof, assignable by indorsement and delivery.

"Witness the hands of the directors of said loan, this 23d day of April, A. D., 1857.

"R. W. SYPHER,

"B. F. ALLEN,

"LOVELL WHITE.

"*Directors Savery Hotel Loan.*"

On the back of this certificate is the following assignment:

"We hereby assign to B. Rice all our right, title, and interest in the within certificate, for value received.

"March 30, 1860.

GREEN, WEARE & RICE."

The present action is brought by Rice, alone, against Savery, to recover the \$500 subscribed by Green, Weare, and Rice.

The petition is at law and seeks no lien. It makes no party defendant but Savery. It states the foregoing facts, sets up the foregoing instruments and alleges that

"the object the said parties had in view in making said note cover the sum of \$60,000, was not only to cover the sums there subscribed, but also all future subscriptions to said loan; and that the full time for the payment of said loans has expired, and the same is now due, with interest from April 30, 1857."

To this petition defendant demurred, because the moneys advanced to said Savery were payable only upon the order of the attorneys, Sypher, Allen, and White, and no such order to plaintiff is averred; because said Sypher, Allen, and White, trustees, and the other subscribers to the loans, are not made parties; because this court has no jurisdiction over trusts; because no privity of contract between plaintiff and defendant is shown; because it is not averred that defendant ever promised to pay Green, Weare & Rice anything. This demurrer was sustained. Plaintiff excepted and appeals.

Byron Rice, pro se.

*Withrow & Wright and C. C. Nourse, for the appellee.*¹

DILLON, J.—The grounds of demurrer, urged in argument, are resolvable into two: *First*, it is insisted that there is no privity of contract between the plaintiff and the defendant, and hence the action is not maintainable in the plaintiff's name. *Second*, it is claimed that there

¹ The arguments are omitted.

is a defect of parties plaintiff, inasmuch as the trustees (Sypher, Allen and White), if not the other subscribers to the loan, are necessary parties. These objections, kindred in their nature, will be considered together.

The Revision has made great changes in relation to parties to actions. Chap. 117.

It is no longer absolutely necessary (§§ 2757 and 2758) that the party to whom a promise is made shall be the plaintiff on the record, in an action to enforce it. That is to say, if the promise is made for the benefit of another who is the real party in interest, the latter may sue, though the contract or promise be made to an agent or trustee; or in the case last supposed, the agent, or trustee, or person in whose name a contract is made for the benefit of another, may sue without joining the party for whose benefit the suit is prosecuted. This is well settled by the previous adjudications of this court.¹

Applying the settled construction of these sections (§§ 2757, 2758,) to the present case, we admit, that since by the note, so called (we refer to the instrument for \$60,000), the defendant promised to pay the trustees, they might have sued him upon it in their own names without joining the subscribers.

We say the trustees might have sued. But *must* the suit be brought by them?

It is argued that the trustees are necessary parties, because they are entitled to commissions; therefore, it is claimed, it would be unjust to hold that the beneficiaries may sue, and thus deprive the trustees of their compensation. There is nothing in this objection, at least when coming from the defendant. The trustees have stipulated for no commissions. If entitled to any, this is a matter between them and the subscribers, a matter with which the defendant has no concern.

In favor of the defendant's view, that the trustees must bring the suit, there is really but one argument which has any force, and that is, that such an action will protect him from a multitude of suits. This objection travels outside the record. The demurrer speaks. It is not alleged in the petition, and hence we do not know, that there are any unpaid subscribers to the loan except the plaintiff.

Upon the theory propounded by defendant's counsel, it would scarcely be denied by them, that all the unpaid subscribers might join in an action on the instrument for \$60,000. At all events such a proposition could not be successfully denied. They would be the real parties in interest, and hence, under the expositions of sections 2757 and 2758, could sue without joining the trustees.

If this is true, then the plaintiff, if he is the only unpaid subscriber, may alone sue upon it, and we repeat that, so far as the petition shows, the plaintiff is the only unpaid subscriber. Indeed, it is not expressly

¹ *Citing*, Conyngham v. Smith 16 Iowa, 471; Cottle v. Cole, 20 Iowa, 482; Taylor v. Adair, 22 Iowa, 279.

averred in the petition that any of the other subscribers ever paid their subscriptions. And the same observations apply to an action, not upon the instruments, but to recover the amount loaned; and on this point the present appeal only requires us to hold that if the plaintiff is the only subscriber who is unpaid, as for aught discloses he is, he may sue alone, and need not join with him the trustees, in an action to recover the amount by him loaned to the defendant.

On the supposition that it shall appear that there are other unpaid subscribers, the court are not exactly agreed in relation to the right of the plaintiff to sue in his own name alone. A portion of the court is inclined to regard the transaction as a several loan by the subscribers, each on his own account; and that, as there was no unity or commingling of interests among the subscribers, who were neither co-partners nor jointly interested, each may sue in his own name and by himself. Another portion of the court is, however, inclined to the view that the only promise by the defendant is contained in the note or instrument for \$60,000; that this promise is single and entire, and hence the defendant can not be compelled to defend more than one action brought by the trustees, or by all of the unpaid subscribers.

As the cause must go back for further proceedings, it has been deemed advisable to suggest to the parties that we are all agreed that, if there are other unpaid subscribers, the trustees, as their representatives, are proper parties to the suit, either as plaintiffs or defendants. The plaintiff may amend and make them parties, changing his proceeding, if he so chooses, in equity. If it turns out that the controversy can not be determined without the presence of the trustees, the court must order them to be brought in. Rev. § 2765.

So it is in the defendant's power, to file a cross petition against the plaintiff and make the trustees parties, if he has a cause of action affecting the subject matter of the present suit. § 2892. And similarly, if he has a set-off or counter-claim.¹ So that if there are numerous claimants against the defendant, and he wishes to settle the whole controversy in one suit, he has it in his power to accomplish this result.

He may allege against the trustees (if made parties by the plaintiff, or if the defendant makes them parties) any matter of defence he may have against the instrument, and ask its cancellation. They or the plaintiff may contest this claim, and thus the matters in controversy will, or at least may, be brought to an end. The judgment of the District Court sustaining the demurrer is reversed, and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

¹ Rev. §§ 2886, 2888, 2889.

COSTER v. THE MAYOR OF ALBANY.

COURT OF APPEALS OF NEW YORK, JANUARY 24, 1871.

[43 N. Y. 399.]

Appeal from a judgment of the General Term affirming a judgment entered on a verdict in favor of the plaintiffs.

The complaint alleges that the plaintiffs were the owners of Lot No. 122, on the Albany pier; that, by virtue of an act of the New York Legislature, entitled "An act to improve the Albany basin, in the city of Albany, and to provide the means therefor," passed April 11, 1866, the public authorities, authorized by said act, proceeded to make changes in the Albany basin lying between said lot and Quay street, in said city, and cut away and removed that portion of the Albany pier lying adjoining to and at the south of said lot, and in so doing undermined the foundation of the building standing on said lot, which obliged the plaintiffs to expend, in making necessary repairs thereto, the sum of \$364.24. It also alleges that, under said act, a bridge at the south end of said pier was removed, cutting off communication between the south end of the pier and the city, except by the State street bridge, which was at a much greater distance from said lot; and that, by reason of the removal of such bridge, the plaintiffs were damaged to the extent of \$3,000; that, by an obligation entered into by the defendants under said act, they had assumed to pay all damages caused to property by the making of the improvements under said act. The obligation, after reciting the statute, contained an agreement by the defendants with the State to

"assume the payment, and that they will pay, for any injuries to any of the bridges crossing said basin (except the Hudson river railroad bridge) that shall hereafter occur or arise in consequence of the improvement made in the basin, as provided in said act, and also will pay all damages caused to property by the making of such improvement, if any such shall arise or accrue, and hereby assume all liability therefor," etc.

The answer denies that the defendants are in any way liable to the plaintiffs for the damages alleged in the complaint.

The case came on to be tried at the Albany circuit, January, 1868, before Mr. Justice Peckham and a jury, when the jury found for the plaintiffs \$400.20 for the first class of damages, and \$800 for the second.

From the judgment entered thereon the defendants appealed to the General Term, where the judgment was affirmed; and from such judgment of affirmance, this appeal was taken to this court.

N. C. Moak and William H. Greene, for the appellant.

A. J. Parker, for the respondent.¹

¹ The arguments are omitted.

FOLGER, J.—In this court, the appellants make four points: 1st. That the respondents were not entitled to damages, by reason of the removal of the Hamilton street bridge. 2nd. Nor for the taking of land near their's, by which their's were rendered less convenient for docking and unloading, and thereby less valuable. 3rd. Nor for injuries alleged to have been sustained by digging too close to their lands, and undermining their foundations. 4th. That there is no privity between the respondents and the appellants, by which the last are liable in an action to the first. . . .¹

The next question is, to whom is the city of Albany liable? The sixth section of the act provides that the State shall not be liable for any damage to property, caused by the making of the improvement; but that if any claim shall arise, the same *shall be paid by the city of Albany*, which shall *give its assent to assuming such liability* and indemnifying the State against the same. So far as this action is concerned, the question above put is mainly affected by the provisions of this sixth section. The city did give its assent, and did covenant to assume the payment, and that it would *pay all damages* caused to property by the making of the improvement. It did thereby assume all liability, and did agree to save harmless and indemnify the State against any claim or claims arising to the property.

It is to be observed, that the instrument executed by the city to the State is not a bond. The city is not bound in a penalty, from which it may be discharged on the performance of a condition. So that the case of *Turk v. Ridge*, 41 N. Y., 206, is not applicable. The instrument is not an agreement of the city, under its corporate seal, with the State, for the protection and indemnity of the State, and the payment of all damages caused to the property, and by it the city doth in terms assume all liability therefor. In consideration that the State would do this work, and in view of the certain result, that damage must be done to property in the doing of it, the city makes to the State this promise, that it will pay that damage. Here is the promise, the consideration, and the promisee, definitely brought out. The ultimate beneficiary is uncertain. It is settled in this State, that an agreement made on a valid consideration, by one with another, to pay money to a third, can be enforced by the third in his own name. *Lawrence v. Fox*, 20 N. Y., 268; *Secor v. Lord*, 3 Keys, 525. And though a distinction has sometimes been made in favor of a simple contract, *Hall v. Marston*, 17 Mass., 575; *D. & H. Canal Co. v. W. Co. Bank*, 4 Den., 97; it is now held that when the agreement is in writing and under seal, the same rule prevails. *Van Schaick v. Third Av. R. R.*, 38 N. Y. 346; *Ricard v. Sanderson*, 41 N. Y., 179. Nor need the third party be privy to the consideration.²

¹ Only so much of the opinion is given as relates to the fourth point.

² *Secor v. Lord*, 3 Keys, 525.

In that class of cases which hold that a grantee of mortgaged premises who takes them subject to the lien of the mortgage, which, by words in the deed of conveyance to him, he assumes to pay, is personally liable to the holder of the mortgage for the amount of the mortgage debt, no question seems to be made, but that the action may be maintained in the holder's name, though the agreement be not made immediately for the benefit of the plaintiff, nor he be named in the deed. Thus in *Burr v. Beers*, 24 N. Y. 178, the clause in the deed described the mortgages as held by John Cramer, which mortgages the grantee thereby assumed to pay. And the case last cited was not an action in equity, for the foreclosure of the mortgage, in which the mortgagor and his grantee were both parties. (See page 179.) It was an action to recover a personal judgment against the grantee. The question was distinctly raised, that there was no privity of contract between the plaintiff and the defendant. And the decision against the defendant was put, in the language of DENIO, J., "upon the broad principle, that if one person make a promise to another for the benefit of a third person, that third person may maintain an action on the promise." In this case the city agreed to pay all damages caused to property, and assumed all liabilities therefor. This was a promise made to the State, for the benefit of any third person, to whose property damage was caused. Nor is it an anomaly, that the liability which the city assumes, is not in existence at the date of its obligation, nor that the person who is to be benefited by it is not then known. So it is with the official bonds of sheriffs and other public officers. And see, *People v. Holmes*, 5 Wend. 191. In *Dutton v. Poole*, 3 Bos. & Pull. 149, note a., and in *Schemerhorn v. Vanderheyden*, 1 Johns. 139, the promisee was, at the time of making the promise, under no legal liability to the person for whose benefit the promise was made.

Our conclusion is that the city became liable to the plaintiffs in this action, and that they may maintain their action against it upon the facts as they appear.

Judgment affirmed to the extent of \$400.20 damages, and reversed as to residue of recovery, without costs of this appeal to either party.

EFFECT IF THE CONTRACT IS UNDER SEAL.

"It seems to be well established that a party for whose use a contract or a stipulation in a contract is made, may maintain a suit in his own name on such stipulation. (*Bank of Missouri v. Benoist and Hackney*, 10 Mo. 519; *Robbins v. Ayres*, 10 Mo. 538; *Myere v. Lowell*, 44 Mo. 328; *Hanagan v. Hutchinson*, 47 Mo. 237.) The old authorities maintain that this can only be done on contracts not under seal. This distinction was noticed by Judge SCOTT in *Robbins v. Ayres*, 10 Mo. 538. But that was a suit on a simple contract, and the question was not properly before the court and what he said must be looked upon as *obiter dicta*. By recent decisions in New York, it is laid down that no such distinction exists. (*Van Shaick v. R. R.*, 38 N. Y. 346; *Ricard v. Sanderson*, 2 Hand, 179; *Coster v. The Mayor of Albany*, 43 N. Y. 399; *Lawrence v. Fox*, 20 N. Y. 268.) I see no good reason for keeping up this sort of distinction between contracts under seal and not under seal. If the covenant is made for the benefit of a third person, why is he not a party to it so as to maintain an action in his own name?"—*Per ADAMS, J.*, in *Rogers v. Gosnell* (1873), 51 Mo. 466, 469.

Accord, also: *McDowell v. Laev* (1874), 35 Wis. 171, 175; *Bassett v. Hughes* (1879), 43 Wis. 319, 321; *Emmitt v. Brophy* (1884), 42 O. S. 82, in text, *supra*.

Contra: *Packard v. Brewster* (1871), 59 Mo. 404. *Fairchild v. N. E. Association* (1879), 51 Vt. 613. *Saunders v. Saunders* (1891), 154 Mass. 337, 338: "In regard to contracts under seal the law has always been that only those who were parties to them could sue upon them." — *Per* MORTON, J., citing *Sanders v. Felley*, 12 Pick. 554; *Johnson v. Foster*, 12 Met. 167; *Northampton v. Elwell*, 4 Gray, 81; *Flynn v. North American Ins. Co.*, 115 Mass. 449; *Flynn v. Massachusetts Benefit Ass'n*, 152 Mass. 288.

The same doctrine long prevailed in Illinois. See *Moore v. House* (1872), 64 Ill. 162. "Where a contract not under seal is entered into by two for the sole benefit of a third person, it appears to be a general principle that the latter may sue thereon in his own name, although the agreement may not be directly to or with him. But where the contract is under seal, the rule seems to be that a covenant can not be sued upon by the person for whose benefit it is made if he is not a party to the deed, but the suit must be brought in the name of the person with whom the covenant is made."

But a recent Illinois statute permits an instrument under seal to be sued upon in any form of action in which such instrument might have been sued upon if it had not been under seal; and in consequence of this statutory change the Supreme Court of Illinois has departed from the common law doctrine on the point. The *ratio decidendi* here is suggestively presented by MAGRUDER, J., in *Webster v. Fleming* (1899), 178 Ill. 140, 147: "While it is admitted that the parties for whose benefit a contract is made, may sue thereon in their own names, although the agreement may not be to or with them, yet it is claimed that this rule only applies to simple contracts, and not to contracts under seal. The contention is, that a person for whose benefit a covenant in a deed is made, can not sue upon such a covenant, unless he is a party to the deed, but the suit must be brought in the name of the person with whom the covenant is made. It was, however, expressly held in *Dean v. Walker*, 107 Ill. 540, that the rule is equally applicable whether the contract is a contract under seal or a simple contract. In that case we said (p. 546): 'But it is said a third party can not bring an action in his own name on a contract under seal between third parties; and in support of this, *Moore v. House*, 64 Ill. 162, is cited and relied upon. In the case cited it was held that a covenant can not be sued upon by the person for whose benefit it is made, if he is not a party to the deed. In the same case it is also held that, where a contract not under seal is entered into by two for the benefit of a third person, it is a general principle that the latter may sue thereon in his own name, although the agreement may not be directly to or with him. What is said in relation to an action on a sealed instrument, is merely a reiteration of the common law rule on that subject when the case was decided, but, since that case was decided, the rule of the common law on that subject has been changed by section 19, chapter 110 of the Revised Statutes of 1874, page 776, so that now it is immaterial, for the purpose of bringing the suit, whether the contract is under seal or not. Chitty, in his work on Pleading (vol. 1, p. 4), says: 'If the instrument be not under seal, it seems to be a general principle that the party for whose sole benefit it is evidently made, may sue thereon in his own name, although the engagement be not directly to or with him.' As our statute has, therefore, abolished the distinction between contracts under seal and those not under seal (except penal bonds), so far as bringing an action on such contracts is concerned, the law, as declared by Chitty, applies as well to contracts under seal, as to those not under seal.'"

"At common law, only an action of *covenant* or *debt* could be brought upon a sealed instrument. The rule that, when one person covenants with another to pay money to or perform some act for the benefit of a third person named in the deed, the action must be brought in the name of the covenantee in the deed and can not be maintained by the third person in his own name, even though he is a party in interest, and even though it is expressly stated to be for his benefit, has its origin in the nature of the action of the covenant, inasmuch as only a party to the instrument under seal can bring an action of *covenant* or *debt*."

CLAFLIN v. OSTROM.

COMMISSION OF APPEALS OF NEW YORK, JANUARY, 1874.

[54 N. Y. 581.]

Appeal from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiffs entered upon the report of a referee.

This action was brought to recover the amount of a debt due the plaintiffs from the firm of S. C. Hanford & Co.

The facts appear sufficiently in the opinion.

Samuel Hand, for the appellant.

Wm. P. Chambers, for the respondent.¹

EARL, C.—Prior to the 13th day of March, 1867, Thomas C. Hanford and Charles Ostrom were partners under the firm name of T. C. Hanford & Co., and they owed the plaintiffs upwards of \$1,200.

On that day they entered into a written agreement for a dissolution of the firm. Hanford assigned all his interest in the firm property to his partner, Ostrom, and the latter agreed to pay the firm debts mentioned in the agreement; and among those mentioned was the debt of the plaintiffs. The defendant, at the same time and upon the same paper, executed a written guaranty to the said Hanford, that Charles Ostrom would perform all the conditions and covenants which were to be performed by him under the agreement. The debt due the plaintiffs not having been paid, they commenced this action, having first taken an assignment from Hanford of all his interest in and claim under the agreement of Charles Ostrom, and the guaranty therein of the defendant. The referee sustained plaintiffs' right to recover upon the assignment to them by Hanford, as well as directly upon the guaranty by the defendant of the performance by Charles Ostrom of his promise to pay plaintiffs' debt; and if the recovery can be sustained upon either ground, I am of the opinion that it can be upon both.

In consideration of the transfer of the firm property to Charles Ostrom he agreed to pay the firm debt to the plaintiffs; and this agreement, made for their benefit, the plaintiffs could adopt and enforce in their own names, within the principles laid down in the following cases: *Lawrence v. Fox*, 20 N. Y., 268; *Burr v. Beers*, 24 N. Y., 178; *Thorp v. Keokuk Coal Co.*, 48 N. Y., 253. Within the same principles, the plaintiffs could bring suit directly against the defendant, who has guaranteed that Charles Ostrom should pay plaintiffs' debt. This guaranty must go with the principal obligation, and be enforceable by the same persons who could enforce that. So, too, Charles Ostrom, having failed to pay the plaintiffs' debt, committed a breach of his

¹ The arguments are omitted.

covenant with Hanford, which gave the latter a cause of action against him and also against the defendant, his surety, and this cause of action he assigned to the plaintiffs. Hence, in either or both aspects, the plaintiffs' right to recover was, upon facts thus far stated, quite clear; and it only remains to be inquired whether certain other facts which appeared upon the trial ought to have defeated the recovery.

On the 26th of February, 1867, the plaintiffs recovered judgment upon their debts against T. C. Hanford & Co., and the following day a levy was made upon sufficient property of the firm to pay the judgment. After this, negotiations for the dissolution of the firm were commenced, which resulted in the written agreement and guaranty, which were executed March 13th. Pending these negotiations, and on the 9th day of March, Charles Ostrom paid plaintiffs a small sum to apply upon their judgment, and gave them his individual note, payable one day after date, for the balance. After the guaranty was executed, the plaintiffs, relying upon that, at the request of Charles Ostrom and the defendant, released their levy and subsequently canceled the judgment. The formal satisfaction of this judgment did not pay or extinguish the firm debt; such was not the intention of the parties. The judgment was a firm debt on the 13th day of March, and the plaintiffs, relying upon the agreement and guaranty that day executed, at the request of Charles Ostrom and the defendant, released their levy and canceled their judgment. By this act of cancellation the firm debt was not paid, and it was not intended by the parties that it should in any way be extinguished. Aside from payment, there were only two ways to discharge the firm debt; one was by a technical release under seal executed with the intent to discharge the debt. Here there was no such release. The other was to discharge the firm debt by substituting some new agreement or obligation, by the consent of the parties, in the place of the firm debt, thus producing what in the civil law would be called a *novation*. Here there was no such substitution, unless it was by the individual note of Charles Ostrom. This note was given on the ninth day of March. The referee has found upon abundant evidence that this note was not given in payment or discharge of the firm debt then in judgment. It is well settled that the individual note of one or two joint debtors or partners will not operate as payment of the joint or partnership debt, unless expressly received as payment. The individual note thus given is treated the same as if a debtor should turn over to his creditor the note of a third person.² This note was, then, received as conditional payment, to operate as payment when paid. The fact that it was subsequently put into judgment by the plaintiffs, which remains unpaid, can make no difference. In all cases where a creditor takes from his debtor the note of a third person, under such circumstances, he may use all lawful means to procure payment of

² Citing, *New York State Bank v. Fletcher*, 5 Wend., 85; *Waydell v. Luer*, 3 Denio, 410; *Bates v. Rosekrans*, 37 N. Y. 409.

the note by judgment or execution, or otherwise; but if in the end he fails to procure or enforce payment of the note, his claim against his original debtor remains, and can be enforced. I can, therefore, perceive no reason to doubt that the conclusion of the referee was right, and the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

HARDESTY v. COX.

SUPREME COURT OF KANSAS, JANUARY TERM, 1894.

[53 Kan. 618.]

Error from Ford District Court.

The opinion states the case.

Sutton & McGarry, for plaintiff in error.¹

ALLEN, J.—The parties to this action agreed that the facts of the case were correctly stated in the petition and attached exhibits. From these, it appears that W. H. Lybrand and Perry Adams were partners in operating a planing mill in Dodge City; that the plaintiff, R. J. Hardesty, at their request, became surety for them on a promissory note for \$1,800, which he was afterward compelled to pay.

A suit was brought by Adams to wind up the partnership affairs. While this suit was pending, an agreement was entered into by the parties by which all matters in controversy were submitted to the decision of arbitrators. This agreement was in writing, and provided that the respective parties should "pay and do as in said award shall be provided." The defendant, Cox, became surety of Lybrand for the performance of his part of the agreement. The arbitrators thereupon made an award in writing, signed by all of them, by the terms of which it was provided that Lybrand should take all the property and credits of the firm, and should pay all the partnership debts, and particularly the \$1,800 note above mentioned. Lybrand failed to pay this note, and this action is brought by Hardesty against Cox, as surety on the arbitration bond, to recover the amount of money paid by him.

The case was referred, tried on the petition as an agreed statement of facts, and a report made, and this report was confirmed and judgment entered for the defendant. A brief is filed by the plaintiff in error only.

We are not advised, either by the record or counsel appearing for the defendant in error, upon what view of the case the court held that the plaintiff could not recover. The arbitration proceedings appear to be regular. Whatever question there may be in other states, it is settled here that an action can be maintained upon a promise made by the

¹ The argument is omitted.

defendant, for a valuable consideration, to a third party, for the benefit of the plaintiff, although the plaintiff was not privy to the consideration.¹

The award of the arbitrators referred specifically to this note and required its payment by Lybrand. There can be no doubt as to his liability, either on the note or under the award. Cox voluntarily became his surety on the arbitration bond. No reason is apparent why plaintiff may not recover from him. The judgment is reversed, with directions to enter judgment for the amount of the note sued on and interest.

All the justices concurring.

CHOUTEAU v. BOUGHTON.

SUPREME COURT OF MISSOURI, APRIL TERM, 1890.

[100 Mo. 406.]

Appeal from Stoddard Circuit Court.

Houck & Keaton, for appellant.

T. H. Mauldin, for respondent.²

BLACK, J.—This is an action of trespass brought by Charles P. Chouteau against George N. Boughton to recover treble damages for cutting and carrying away trees and timber from the described lands situate in Stoddard County. The trespass is alleged to have been committed on September 1, 1879, and at divers times since that date. The suit was commenced on August 14, 1883.

The affidavit for an attachment, sued out in aid of the action, states that the amount which the plaintiff ought to recover is \$9,000, single damages, and that he has good reason to believe and does believe that the damages for which the action is brought are for injuries arising from the commission of some felony or misdemeanor by the defendant, as set forth in the petition. To this affidavit the defendant filed a plea in abatement; the trial thereon resulted in a verdict and judgment for defendant, and the plaintiff appealed. The errors assigned are: (1) The exclusion of evidence offered by the plaintiff; and (2) the giving of an instruction which directed a verdict for the defendant.

The evidence shows that, on May 23, 1857, the Cairo & Fulton Railroad Company executed a deed of trust to three trustees, namely, John Moore, John Wilson, and A. G. Waterman, thereby conveying to them the lands in question and a large amount of other lands and railroad property, to secure the payment of bonds. Joseph C. Moore and Geo.

¹ *Citing*, *Anthony v. Herman*, 14 Kan. 494; *Harrison v. Simpson*, 17 *id.* 508; *Railway Co. v. Hopkins*, 18 *id.* 494; *Floyd v. Ort*, 20 *id.* 162; *Life Assurance Society v. Welch*, 26 *id.* 632; *Strong v. Marcy*, 33 *id.* 109; *Burton v. Larkin*, 36 *id.* 246; *Rickman v. Miller*, 39 *id.* 362; *Manufacturing Co. v. Burrows*, 40 *id.* 363.

² The arguments were omitted.

H. Bridges, as administrators of G. M. Patterson, E. O. Reed, Henry E. Seelye, and Charles P. Chouteau, the present plaintiff, owned the bonds and were the only beneficiaries in the deed of trust. The deed of trust contains a provision to the effect that the lands shall be deemed to be in the legal possession of the trustees.

The deed of trust was foreclosed by a decree entered in this court in October, 1881, and the commissioner then appointed by this court sold the lands in question to Charles P. Chouteau, who received a deed therefore dated October 26, 1882. The debt evidenced by the bonds amounted to over \$4,000, and the sale of the entire property specified in the deed of trust left a large unpaid balance.

The bill of exceptions states that plaintiff offered in evidence a writing whereby the administrators of Patterson and Reed, and Seelye assigned to the plaintiff the right to sue for and recover for any and all trespasses which had or might be committed on the lands in question, which assignment was excluded by the court; the date of the assignment is not stated. The plaintiff then offered to show by a number of witnesses that during 1881 and 1882 the defendant sold to different firms and persons timber standing upon the lands; that the timber so sold was cut and taken away, and that defendant received and collected the money arising from such sales; that defendant sold the timber, claiming to be the agent of Thomas Allen, but that he had no authority from Allen to sell the same. The plaintiff offered to show further that defendant endorsed the trespassers, collected pay for the timber, and shared in the profits of cutting and carrying away trees, timber, and saw-logs. All of the foregoing evidence was excluded, wherefore the court directed the jury to find for the defendant.

1. One of the objections made to the assignment from Reed and Seelye and the administrators of Patterson to the plaintiff, giving him the right to sue for and collect damages arising from trespasses was, that a right of action arising from the commission of a tort can not be assigned. There can be no doubt but a cause of action for damages arising from a trespass upon real estate will survive and pass to the personal representatives of a decedent. R. S. 1879, sec. 96. As the cause of action would survive to the personal representatives it is assignable, though based upon a tort. *Snyder v. Railroad*, 86 Mo. 613.

Indeed the defendant concedes in this court that the assignment should not have been excluded on the ground that a cause of action for such a tort is not assignable.

But the defendant insists that the assignment and also the other evidence was properly excluded, because the plaintiff did not have the title to the land until the date of the commissioner's deed, namely, October 26, 1882; and that the cause of action for trespasses prior to that date accrued to the trustees in the deed of trust and not to the plaintiff and the other bondholders; and hence they had nothing to assign to him and he has no cause of action through the assignment or in his own

right. It was held in *Pace v. Pierce*, 49 Mo. 393, that a trustee in a deed of trust upon personal property, given to secure a debt, had the right to sue for and recover the property even after he had made a sale. It was considered that he had the right to recover the property to the end that he might turn the same over to the purchaser. And in the more recent case of *Lancaster v. Insurance Co.*, 92 Mo. 460, the plaintiff held the title to the property covered by a building as trustee of a married woman, with power to apply the rents to her sole use, and with power to sell. We held that the trustee could maintain a suit for damages done to the house, though the suit was not commenced until after he had sold the property. From these and other cases the defendant insists that the trustees, and the trustees alone, can maintain this action, and cites *Myers v. Hale*, 17 Mo. App. 205, which perhaps gives some countenance to the claim. But it does not follow because the trustees could maintain this suit that the beneficiaries in the deed of trust can not. The practice act provides that every action shall be prosecuted in the name of the real party in interest, except as provided in the next section; and that section declares that a trustee of an express trust may sue in his own name without joining with him the person for whose benefit the suit is prosecuted. The same section declares that a trustee of an express trust shall be construed to include a person with whom or in whose name a contract is made for the benefit of another. Under these sections of the statute it has been held, on several occasions, that where the contract is made in the name of one person for the benefit of another, the suit may be either in the name of the trustee or in the name of the beneficiary. Either may sue.¹

A mortgagee is entitled to recover damages for permanent injuries done to the mortgaged land by third persons, and until the debt is paid his right to such damages is superior to that of the mortgagor. 1 Jones on Mortgages (4 Ed.) sec. 695 a. The alleged trespasses were committed while the suit of foreclosure was pending, and were continued after a final decree had been entered by the Supreme Court, and the property did not sell for enough to pay the bonds. The beneficiaries are few in number, and are the real parties in interest. A judgment on the merits in their suit or that of their assignee would bar an action by the trustees. It follows from what has been said that the beneficiaries or their assignee may maintain this suit, though the trespasses were committed before the date of the commissioner's deed to plaintiff.

2. This much has been said on the questions before considered because they are the only questions urged in defendant's brief, and because they must arise on a trial of this case on its merits.

It is deemed proper, however, to say that the only question of fact, which does or can arise on the trial of the plea in abatement, is whether the damages sued for are for injuries arising from the commission of

¹ Citing, *Rogers v. Gosnell*, 51 Mo. 466; *McComas v. Ins. Co.*, 56 Mo. 573; *Snider v. Ex. press Co.*, 77 Mo. 523; *Bliss on Code Plead.*, secs. 45 and 46.

some felony or misdemeanor. The merits of the plaintiff's case as stated in his petition are not the subject of inquiry on the plea in abatement. On this issue the assignment was irrelevant and for that reason properly excluded; but the other excluded evidence tended to show that the trespass was one made a misdemeanor by section 1359, Revised Statutes, 1879, and should have been received. The judgment is therefore reversed and the cause remanded for new trial.

All concur.

HARVEY LUMBER COMPANY v. HERRIMAN & CURD LUMBER COMPANY.

ST. LOUIS COURT OF APPEALS, FEBRUARY 4, 1890.

[39 Mo. App. 214.]

Appeal from the Hannibal Court of Common Pleas.

Harrison & Mahan, for the appellant.

R. E. Anderson, for the respondent.¹

ROMBAUER, P. J.—This suit is for a balance of \$135.48 claimed to be due upon a bill of lumber sold and delivered. The answer admits the sale and value, but avers a counter indebtedness of the plaintiff to the defendant to the same extent, and claims a set-off, and judgment for costs. Upon the trial of the cause before a jury, the defendant recovered a verdict, the judgment was entered accordingly, from which the plaintiff prosecutes this appeal.

The errors assigned are, that the answer stated no valid set-off, and that the court erred in admitting any evidence in its support, and that the court erred in admitting illegal evidence for the defendant, and misdirected the jury in its instructions.

The answer of the defendant states, in substance, the following facts: That, heretofore, J. M. True & Co. were indebted to Herriman and others in the sum of \$451.59; that this claim was transferred for value to the defendant, whose corporate name is the Herriman & Curd Lumber Company, but which is also known as the Herriman & Curd Company; that after defendant acquired such claim, the said J. M. True & Co. sold to the plaintiff all its stock in trade, and the plaintiff agreed, in consideration thereof, to pay sundry debts of said J. M. True & Co., including the debt of \$451.59 due to this defendant; that the defendant demanded payment of such claim from the plaintiff, and the plaintiff did, prior to the institution of this suit, pay to the defendant \$316.11, leaving the balance of \$135.48 unpaid, which balance the defendant claims to off-set in the present proceeding.

The objection, which refers to the sufficiency of the answer, is supported by *Manny et al. v. Frazier's Adm'n*, 29 Mo. 419, and *Page v.*

¹ The arguments are omitted.

Becker, 31 Mo. 466. These cases hold that, upon a promise, made by A to B, to pay an existing debt of B to C, A is not liable to C, but to B alone; that such an agreement, not being tripartite, is not in the nature of a novation, and hence no privity of contract exists between A and C. That such is the view of the law taken in those cases, may readily be conceded. But, while they have never been overruled in express terms, they are utterly irreconcilable with subsequent decisions of the Supreme Court, and must be considered as overruled.¹

This disposes of the first assignment of error against the appellant.

There is nothing in the plaintiff's contention, that the Herriman & Curd Lumber Company and the Herriman & Curd Company are two different corporations, and that the Herriman & Curd Lumber Company was never sued in this action, but entered its appearance voluntarily, and could not by so doing, give the benefit of a claim, which it held against the plaintiff, to another defendant who is sued. A party sued by a wrong name may appear to the action by his right name, and it is his duty so to do. Here it appears, from the very inception of the litigation, that there never was but one corporation, and that its corporate name was the Herriman & Curd Lumber Company, although, right or wrong, it sometimes dropped the word "lumber" from its name for the sake of brevity or convenience. This appears not only by the uncontroverted evidence, but by many of the original papers filed in the case by the plaintiff itself, in which the Herriman & Curd Lumber Company is named as the sole defendant. . . .²

The paper, thus offered in evidence, purported to be a memorandum or receipt executed by plaintiff to J. M. True & Co., reciting a number of items consisting of stock in trade and accounts as received by plaintiff, and a number of liabilities of J. M. True & Co. (including the claim of Herriman & Waples, which forms the subject of the present set-off), which apparently formed the consideration of the transfer to the plaintiff. The paper did not purport to set out the entire contract between plaintiff and J. M. True & Co., and the defendant proved by True and another witness that it was only a memorandum forming part of an oral contract, by the terms of which the plaintiff, in consideration of the transfer of these assets, agreed absolutely to pay the claim therein enumerated in full.

The plaintiff claimed that the paper on its face indicated that it was an assignment for the benefit of creditors, and that it was chargeable only as trustee, with the amounts realized, and was so chargeable for the benefit of all the creditors of J. M. True & Co., *pro rata*, and the plaintiff also objected to the evidence of True, because it tended to vary and contradict the written instrument. There is nothing in either of

¹ *Citing Meyer v. Lowell*, 44 Mo. 328; *Flannagan v. Hutchinson*, 47 Mo. 237; *Rogers v. Gosnell*, 51 Mo. 466; s. c., 58 Mo. 589; *Cress v. Blodgets*, 64 Mo. 452; *Fitzgerald v. Barker*, 70 Mo. 687; *Amonett v. Montague*, 75 Mo. 49; *Mossman v. Bender*, 80 Mo. 584.

² Part of the opinion, on a question of evidence, is omitted.

these objections. Where a part only of a contract has been reduced to writing, oral evidence is always admissible to show the residue of the contract. *O'Neil v. Crain*, 67 Mo. 250; *Life Ass'n v. Cravens*, 60 Mo. 388. The paper, upon its very face, was incomplete and unintelligible without proof of the contract of which it formed a part, and, under the evidence before the court, there was nothing which would have justified it to treat the transaction as a general assignment.

It necessarily follows that the instructions asked by the plaintiff, to the effect that, as a matter of law, the defendant was not entitled to recover on its set-off, and that the transfer from J. M. True & Co. to plaintiff was in the nature of a general assignment, making the plaintiff chargeable only as trustee, were properly refused.

There is no error in the record, and the judgment is affirmed. All the judges concur.

BEESON v. GREEN.

SUPREME COURT OF IOWA, OCTOBER 21, 1897.

[103 Iowa, 406.]

Action at law on a covenant in a deed assuming and agreeing to pay a mortgage on certain land. Trial to jury. Judgment on verdict directed for plaintiff, and defendants appeal.

J. W. Cory, for appellants.

C. M. Brooks and *L. E. Francis*, for appellee.

LADD, J.—This action is based on a covenant in conveyance of a tract of land in Murray county, Minn., by William Deyoe to L. C. and M. D. Green, by the terms of which the grantees assume and agree to pay certain mortgages, including the one sued on, executed by Deyoe to Adeline Dwinell, and assigned by her to the plaintiff. This deed was made and delivered to the defendants in November, 1893, and by them immediately placed on record, and subsequently they sold and conveyed the land. There was no objection to the deed until the beginning of this action, more than two years afterwards. That the deed was accepted is not questioned, nor could it be, under such circumstances. The defendants had made all the use of the instrument for which it was designed. It had served the purpose of transferring title to them, and had enabled them to convey the estate to another. They insist, however, that the deed was made in their absence, and that they never agreed to pay the mortgage. But the agreement to pay is in writing. By accepting the deed they obligated themselves as effectually as though they had signed it.¹

The terms of the covenant are clear and unambiguous, and oral evi-

¹ Citing *Crawford v. Edwards*, 33 Mich. 354; *Huyler's Executors v. Atwood*, 26 N. J. Eq. 504; *Spaulding v. Hallenbeck*, 35 N. Y. 206; *Dock Co. v. Leavitt*, 54 N. Y. 35.

dence is not admissible to vary them. Authorities need not be cited in support of this elementary rule, but see *Muhlig v. Fiske*, 131 Mass. 110, where it is said: "The defendant, having by the delivery, which the jury had found, accepted the deed of conveyance, and thereby obtained the estate which he afterwards conveyed to a third party, and so made himself liable to the burden which by the terms of the deed he had assumed, could not (no fraud in the execution or delivery of the deed being suggested) impair the legal effect of his own act by oral evidence that he never agreed to assume and pay the mortgage, nor authorized nor knew of the insertion of such an agreement in the deed. Such evidence, except so far as it tends to show that there had been no delivery of the deed, was therefore rightly excluded, independently of a question of pleading." The appellants reply on *Rogers v. Castle*, 51 Minn. 428 (53 N. W. Rep. 651), and *Gold v. Ogden*, 61 Minn. 88 (63 N. W. Rep. 266). These are not in point, as in each case it is simply held that the grantee named took the land as trustee, and did not accept the deed with the burden imposed.

There is no evidence tending to show that any fraud was practiced on the defendants to induce them to take the deed, and no excuse is presented for doing so without reading it. Even though contrary to the previous contract, they accepted it as prepared, and, until reformed, are bound by it as fully as though drawn precisely as agreed. This is the rule ordinarily applied to written contracts, and finds support directly in point in *Follansbee v. Johnson*, 28 Minn. 311 (9 N. W. Rep. 882), and *Coolidge v. Smith*, 129 Mass. 554. Whether the facts presented a case for reformation of the deed need not be determined, as such relief is not sought, and could not be granted in an action at law.

II. It is insisted the defendants are not personally liable for the payment of the debt until the mortgaged property is exhausted. A stranger to a contract made for his benefit may maintain an action thereon.¹ A mortgagee may maintain an action at law on the covenant to pay in the mortgage or on the note,² and may thereafter foreclose his mortgage.³ It is not perceived on what tenable grounds the same rules do not apply to a grantee in a deed assuming to pay a mortgage for which the grantor is personally liable. Such grantee becomes obligated for the payment of the debt.⁴ And on foreclosure personal judgment will be rendered against him.⁵ Applying the rule permitting a stranger to a contract for whose benefit it was made to enforce it, under the cited authorities, there is no escape from the conclusion that an action at law may be

¹ Citing *Mills v. Brown*, 11 Iowa, 314; *Johnson v. Collins*, 14 Iowa, 63; *Johnson v. Knapp*, 36 Iowa, 616; *McHose v. Dutton*, 55 Iowa, 728; note to *Linneman v. Moross*, 38 Am. St. Rep. 531 (57 N. W. Rep. 103).

² Citing *Banta v. Wood*, 32 Iowa, 469; *Brown v. Cascaden*, 43 Iowa, 103.

³ Citing *Morrison v. Morrison*, 38 Iowa, 73.

⁴ Citing *Moses v. Clerk of Court*, 12 Iowa, 139; *Wood v. Smith*, 51 Iowa, 156.

⁵ Citing *Corbett v. Waterman*, 11 Iowa, 86; *Thompson v. Bertram*, 14 Iowa, 476; *Bowen v. Kurtz*, 37 Iowa, 239; *Ross v. Keunison*, 38 Iowa, 396; *Bank v. Mesarvey*, 101 Iowa, 285.

maintained against a grantee in a deed on the covenant assuming the payment of the mortgage debt, without first foreclosing the mortgage.¹

Affirmed.

TRIMBLE v. STROTHER.

SUPREME COURT OF OHIO, DECEMBER TERM, 1874.

[25 O. S. 378.]

Motion for leave to file a petition in error, to reverse the judgment of the District Court of Van Wert County.

The defendant in error, Alexander R. Strother, being a creditor of the firm of Rockwell, Long & Co., sued Trimble, the plaintiff in error, to recover the amount due him from Rockwell, Long & Co. His cause of action against Trimble is founded upon a written agreement, entered into between Trimble and Rockwell, Long & Co., whereby the former, in consideration of the sale and transfer of the firm assets, assumed to pay the liabilities of the firm.

The answer set up two defences.

The substance of the first defence is, that at the time of the making of the agreement, and for the purpose of inducing Trimble to enter into it, Rockwell, Long & Co. made a statement to him of the persons to whom they were liable, and the several amounts of such liabilities; that Strother was not among the persons thus named, and that they represented to Trimble that Strother held no claim against them; that these representations were false, and were made with intent to deceive Trimble, and to induce him to enter into the agreement, and that, relying on the truth of such representations, he was induced to sign the agreement.

The second defence is, in substance, that before Trimble had notice of the claim of Strother against Rockwell, Long & Co., the agreement by which Trimble assumed to pay the liabilities of Rockwell, Long & Co. had, by the consent of all the parties to it, and upon certain considerations in the answer set forth, been rescinded.

A general demurrer was filed to the answer. The demurrer was sustained by the Court of Common Pleas, and, without further pleading, judgment was rendered on the petition.

On error the judgment was affirmed by the District Court.

To reverse these judgments, application is now made for leave to file a petition in error.

T. H. Wiggins and Geddes, Dickey, and Jenner, for the motion.

*Isaac N. Alexander and G. M. Saltzgeber, contra.*²

¹ Citing *Burr v. Beers*, 24 N. Y. 178; *Follansbee v. Johnson*, *supra*; *Campbell v. Smith*, 71 N. Y. 26.

² The arguments are omitted.

WHITE, J.—We think the court erred in sustaining the demurrer to the answer. Had the error been to the defences, separately, it should have been overruled as to both.

The plaintiff brought his action to recover a debt which the defendant agreed with Rockwell, Long & Co. to pay the plaintiff. Before the plaintiff assented to or acted on the promise thus made in his favor, the agreement had been rescinded. This, surely, constituted a good defence.

We do not question the former rulings of this court, that a party may maintain an action on a promise made for his benefit, although the consideration moved from another, to whom the promise was made. But this rule must be understood and applied with its proper qualifications.¹

The plaintiff was a creditor of Rockwell, Long & Co. He had not surrendered his claim against them, nor had he assented to the provisions which they had made for its payment. He was not bound to accept it, and, until he did so, there was certainly nothing to prevent the parties to the agreement from rescinding it.

The plaintiff's right rests solely on the agreement. He claims under Rockwell, Long & Co. In such case, if he has not been induced to alter his position by relying in good faith on the promise made in his favor, the defendant is not estopped from setting up any defence which he could have set up against the enforcement of the promise by the contracting party.

Leave to file the petition is granted; and under section 515 of the code as amended (72 Ohio L. 173), all the judges concurring, the judgment of the District Court, as well as that of the Court of the Common Pleas, is reversed; the demurrer to the answer overruled; and the cause remanded for further proceedings.

McILVAINE, C. J.; WELCH, REX, and GILMORE, JJ., concurred.²

¹ Citing *Bagley v. Waters*, 7 Ohio St. 359; *Thompson v. Thompson*, 4 Ohio St. 333; *Miller & Co. v. Florer*, 15 Ohio St. 151; *Pike v. Brown*, 7 Cush. 133; *Brewer v. Dyer*, *id.* 337; *Millen v. Whipple*, 1 Gray, 317; *Butterfield v. Hartshorn*, 7 N. H. 345; *Owen v. Bowen*, 4 Car. & P. 93.

² See also, *Crowell v. Hospital of St. Barnabas* (1876), 27 N. J. Eq., 650. *Amonett v. Higgins* (1882), 80 Ky., 409, 417; *Biddle v. Brizzolara* (1883), 64 Cal. 354, 363; *Berkshire Life Ins. Co. v. Hutchings* (1884), 100 Ind. 496: "Where A., the grantee of B., agrees to pay B.'s mortgage debt to C. as part of the purchase money of the land, A. does not thereby become the debtor of C., but there must be some act of adoption by C. to entitle him to the benefit of A.'s contract; and if, before such adoption, A. and B. rescind their contract, there is nothing left for C. except his original claim against B., and in a suit to foreclose his mortgage he is not entitled to a personal judgment against A."

In *Brewer v. Maurer* (1883), 38 O. S. 543. M. held the notes of B. secured by a mortgage on his land. B. conveyed the land to a married woman, by deed of general warranty, in consideration of a sum of money paid, and of her accepting a deed in which "said grantee assumes . . . as part of the purchase money," said mortgage debt. This was the only separate property she possessed. She conveyed the land to one French, and he conveyed to the defendants by like deeds, each containing a stipulation in favor of their grantors that the grantees assumed and agreed to pay the mortgage debt as part of the purchase money. Upon foreclosure and sale, the proceeds were insufficient to pay the mortgage debt. The mortgagee sued to recover the balance from French's grantees. Their answer alleged "that since said 24th day of December, A. D. 1875, when said deed containing said

NEW YORK LIFE INSURANCE COMPANY v. AITKIN.

COURT OF APPEALS OF NEW YORK, FEBRUARY 24, 1891.

[125 N. Y. 660.]

Appeal from a judgment of the General Term of the Superior Court of the city of New York, entered upon an order overruling plaintiff's exceptions and directing a judgment for the defendant upon a verdict directed by the court, said exceptions having been ordered to be heard in the first instance by the General Term.

On December 3, 1868, Phoebe T. Drew and John G. Drew, her husband, of Elizabeth, New Jersey, executed their bond conditioned for the payment to the plaintiff of \$4,000, one year from the date thereof, and as collateral security therefor, at the same time, executed to the plaintiff, the New York Life Insurance Company, a mortgage on certain premises in Elizabeth, New Jersey. On December 15, 1869, Mrs. Drew and her husband conveyed the mortgaged premises to John Gregg by a deed in which the grantee covenanted and agreed to pay the mortgage above mentioned. On December 28, 1870, Gregg and his wife conveyed the mortgaged premises to Helen E. Aitkin by a deed which contained an assumption clause in the following words:

"And this conveyance is made subject nevertheless to the lien of a certain mortgage made and executed by the said party of the first part to the New York Life Insurance Company, bearing date the 3rd day of December, 1868, to secure the sum of four thousand (4,000) dollars, lawful money of the United States, with interest thereon, which mortgage, forming a part of the consideration money hereinbefore expressed and having been deducted therefrom, the said party of the second part hereby assumes and undertakes to pay and indemnify and to save said party of the first part harmless therefrom."

Mrs. Aitkin entered into possession of the premises so conveyed and remained in possession as owner thereof until May, 1873, when she conveyed them to Aaron H. Rathbone by deed, in which he assumed payment of the mortgage. Mrs. Aitkin and her husband moved to the

covenant was executed and delivered, the said L. B. French, the grantor of these defendants, and in whose deed said covenant is contained, for a good and valuable consideration, has released and discharged these defendants of and from any and all liability to him, the said French, on account of the aforesaid covenant, and that thereby the defendants are wholly discharged and released therefrom, and that plaintiff, by reason thereof, can not have and maintain his aforesaid action against these defendants." Said the Court, per JOHNSON, J., "Giving this answer a liberal interpretation instead of a technical one, we think it a sufficient plea of a release, and, therefore, the demurrer of the plaintiff below should have been overruled. No such release after the rights of the mortgage had become fixed, would operate as a discharge. The contract for the benefit of the mortgagee was one which he could avail himself of or not, at his election, but until he had done some act which fixed his right, it was competent for the parties thereto, in good faith, and for a valuable consideration, to rescind or cancel it."—*Ed.*

city of New York in 1873 or 1874, and she died there in 1875. She left a will in which her husband, the defendant, was named executor. The will was admitted to probate in the city of New York and letters testamentary thereon were issued to the defendant.

In September, 1879, the plaintiff filed a bill in the Court of Chancery in New Jersey to foreclose the mortgage and named as parties defendant in that suit Phoebe T. Drew, John G. Drew, John Gregg, Helen E. Aitkin, James Aitkin, Aaron H. Rathbone, and Mrs. Aaron H. Rathbone.

The bill alleged the making of the bond and mortgage by Drew and the conveyance of the mortgaged premises to Gregg and his assumption of the mortgage; the conveyance by Gregg to Helen E. Aitkin and her assumption of the mortgage; the conveyance by Helen E. Aitkin to Aaron H. Rathbone and his assumption of the mortgage. It alleged default in payment of the mortgage and prayed for the foreclosure of it and for payment of any deficiency arising on the sale by Phoebe T. Drew, John G. Drew, John Gregg, Helen E. Aitkin, and Aaron H. Rathbone. Phoebe T. Drew, John G. Drew, and John Gregg were personally served with process within the state of New Jersey, and the other defendants, who resided in the state of New York, by publication and mailing. The bill was taken as confessed on February 20, 1880; on March 5th, 1880, there was a decree of foreclosure and sale and a decree for the payment of the deficiency by the defendants against whom it was asked. The mortgaged premises were sold on March 26, 1880, and resulted in a deficiency of \$1,590.80.

On September 28, 1888, a few days before the commencement of this action, the defendant procured from John Gregg a release from the covenant of assumption contained in the deed to Helen E. Aitkin in the following language:

"For and in consideration of one dollar lawful money of the United States of America to me in hand paid by James Aitkin, as executor of the last will and testament of Helen E. Aitkin, deceased, I hereby release and discharge the said James Aitkin, as executor as aforesaid, of and from any liability to me for, because, or by reason of the assumption by the said Helen E. Aitkin and her undertaking to pay a certain mortgage of four thousand dollars to the New York Life Insurance Company, dated December 3, 1868, with interest, contained in a certain deed bearing date the 28th day of December, A. D. 1870, made by me and my wife Phoebe (now deceased) to said Helen E. Aitkin and recorded in the office of the clerk of Union County in Book 42 of Deeds on page 452, etc., in the state of New Jersey.

"Witness my hand and seal, dated September 28, 1888.

"JOHN GREGG. (L. S.)"

This action was commenced on the covenant of assumption contained in the deed from Gregg to Mrs. Aitkin, on the 11th day of October, 1888, to recover the balance due upon the bond and mortgage. The material facts set out were alleged in the complaint, and the amount

claimed was \$1,590.80, with interest from March 5, 1880, which was alleged to be the deficiency upon the New Jersey foreclosure of the mortgage.

The defendant in his answer put in issue all the material allegations of the complaint, and alleged several defences as follows: (1) That at the time of the deed to her, Mrs. Aitkin, she was a married woman, and that she was not, by the laws of New Jersey, personally bound by her covenant of assumption. (2) That he had no notice of the New Jersey foreclosure suit, and that neither he nor his wife was made a party thereto. (3) That he was discharged from any liability by reason of the release executed to him by John Gregg. (4) That no leave of the court was obtained by the plaintiff to bring the action before the commencement thereof. (5) That the action was barred by the New Jersey Statute of Limitations.

The action was brought to trial, and the facts above stated and other facts were proved. At the close of the evidence on both sides, the plaintiff moved for the direction of a verdict in its favor for the amount claimed, with interest; the defendant moved for the direction of a verdict in his favor. The trial judge denied the plaintiff's and granted the defendant's motion, and directed the plaintiff's exceptions to be heard at the General Term in the first instance, and that the entry of judgment be in the meantime suspended.

Henry G. Atwater, for appellant.

Edward W. Scudder Johnston, for respondent.¹

EARL, J.—The record discloses that the plaintiff was defeated at the Circuit, and the verdict there ordered in favor of the defendant upon the sole ground that he was, by the release executed to him by Gregg, absolutely discharged from the covenant of assumption made by his wife, the testatrix; and the effect of the release is, therefore, the first matter now to be considered.

If the question is to be governed by the law of this state, it is entirely clear that the release did not discharge the defendant. The covenant of assumption had, long before the release, come to the notice of the plaintiff, and it had adopted and acted thereon. Having no notice of the death of Mrs. Aitkin, it commenced the action for the foreclosure of the mortgage in the state of New Jersey, and inserted her name in the process and complaint as a party, and prosecuted the action to judgment upon the assumption that she had been made a proper party thereto. In the complaint in that action the covenant of assumption was alleged, and a deficiency judgment was prayed against Mrs. Aitkin and others. Whatever may be the effect of those foreclosure proceedings, they were at least competent to show that the plaintiff adopted and relied upon the covenant of assumption made by Mrs. Aitkin. After that covenant had thus come to the attention of the plaintiff, and had been adopted by it, Gregg, the covenantee, could not release her or her estate from

¹ The arguments are omitted.

the obligation of the covenant, and so the law must be deemed to be finally settled in this state. *Gifford v. Corrigan*, 105 N. Y. 223; S. C. 117 *id.* 257; *Watkins v. Reynolds*, 123 N. Y. 211. Therefore, if the law of this state governs, the release was not operative to bar this action.

But we reach the same conclusion if, as contended by the defendant, the effect of the release is to be determined by the law of New Jersey. There the courts hold that a covenant by a grantee of mortgaged premises, contained in the deed to him, to assume and pay the mortgage debt, is a contract with his grantor only for the indemnity of the latter, and may be released and discharged by him; and generally that where parties have made a contract which will, either directly or indirectly, benefit a mere stranger, they may at their pleasure abandon it and mutually release each other from its performance, regardless of the stranger's interest, unless the parties, with knowledge that he is relying on the contract, suffer him to put himself in a position from which he can not retreat without loss in case the contract be not performed, and that then he may ask to have the contract performed so far as it touches his interest. They hold that the mortgagee in such a case may enforce the covenant of assumption in equity, on the principles of equitable subrogation, thus appropriating a security which the mortgagor has obtained from his grantee for the benefit of the mortgage; and the rule there seems to be that the covenant can only be enforced in equity. But the courts there have held further that a release of a grantee's assumption of a mortgage debt, given by an insolvent grantor, without consideration, and for the sole and admitted purpose of defeating the mortgagee's claim in equity for a deficiency, is void in equity; that the release to be operative must be given in good faith and for a valuable consideration, and not for the sole purpose of defeating the claim of the mortgagee. The following authorities were proved upon the trial and are ample to sustain the views just expressed. *Cromwell v. Currier*, 27 N. J. Eq. 152; *Trustees v. Anderson*, 30 *id.* 366; *Youngs v. Trustees*, 31 *id.* 290; *O'Neill v. Clark*, 33 *id.* 444. . . .

But the defendant makes the further claim that according to New Jersey law, his liability upon this assumption clause could, in any event, be enforced only in an equitable action, and possibly in an action to foreclose a mortgage to which he had in some way been made a proper party. But this is a matter of mere form, not of substance, and relates to procedure; and the procedure in an action in this State must be governed by the laws of this state; and by our law an action at law may be maintained upon such a covenant.

It is further said that in New Jersey the plaintiff could only assail the release by alleging the fraud, and thus tendering an issue upon the question of its fraudulent execution. This is again matter of procedure to be regulated by the practice in this state. No notice is taken of the release in the complaint, and at the time of the service thereof it is probably true that the plaintiff had no knowledge of the release. It is

set up in the answer, but not as a counterclaim. It was, therefore, not necessary for the plaintiff to reply to the answer, and it was entitled to meet the answer by any competent evidence to defeat or avoid its allegations. If the defendant had desired a distinct issue upon the release, he could have procured one under Section 516 of the Code of Civil Procedure by a motion to the court for a direction to the plaintiff to reply to the new matter. A still further answer to this objection, although not so fundamental, is that no question, as to the pleading in reference to this matter, was raised at the trial.

We are, therefore, of the opinion that the courts below erred in holding, upon the facts proved in this case, that the release furnished a defence to the action. . . .¹

*Judgment reversed.*²

¹ Part of the opinion, on other questions, is omitted.

² "Of course, it is difficult, if not impossible, to reason about it [the effect of a release by the grantor of a covenant by his grantee to pay a mortgage on the land conveyed] without recurring to *Lawrence v. Fox*, 20 N. Y. 268, and ascertaining the principle upon which its doctrine is founded. That is a difficult task especially for one whose doubts are only dissipated by its authority, and becomes more difficult when the number and variety of its alleged foundations are considered. But whichever of them may ultimately prevail, I am convinced that they all involve, as a logical consequence, the irrevocable character of the contract after the creditor has accepted and adopted it, and in some manner acted upon it."—*Per* FINCH, J., in *Gifford v. Corrigan* (1889), 117 N. Y. 257, 262. (S. C. *Williston's Cases on Contracts*, 535.)

And see *Rogers v. Gosnell* (1875), 58 Mo. 589, 591: "It is a presumption of law that when a promise is made for the benefit of a third person he accepts it, and to overthrow this presumption a dissent must be shown."—*Per* WAGNER, J.

Bassett v. Hughes (1877), 43 Wis. 319, 321; (S. C. *Williston's Cases on Contracts*, 541): "It is quite immaterial, if the defendant's covenant to pay his father's debts, was afterwards rescinded by mutual agreement between the parties to it. Before that was done, the plaintiffs had been informed of the covenant, and made no objection thereto; indeed the fair inference from the testimony is, that the plaintiffs fully assented thereto. Whether it was or was not competent for the parties to the covenant to rescind it before such notice to and assent by the plaintiffs, we need not here determine. Certainly, after such notice and assent, the covenant could not be rescinded to the prejudice of the plaintiffs, without their consent."—*Per* LYON, J.

See also *Carnahan v. Tousey* (1883), 93 Ind. 561, 564; *Watkins v. Reynolds* (1890), 123 N. Y. 211.

Compare *Smith v. Flack* (1883), 95 Ind. 116, 120: "It is true, as asserted by the appellants, that the parties to the agreement had the right to rescind at any time before the promise of Hammons had been accepted by the persons in whose favor it was made. If the contract in this case was so rescinded, the rescission would have constituted a good defence to the action, but in order to make it available as a defence, it was necessary for the appellants to have specially pleaded it by way of answer. *Davis v. Calloway*, 30 Ind. 112. The appellee was not required to aver in his complaint that the contract had not been rescinded, as the legal presumption existed that it was still in force."—*Per* COLERICK, J.—*Ed.*

CLARK *v.* HOWARD.

COURT OF APPEALS OF NEW YORK, OCTOBER 6, 1896.

[150 *N. Y.* 232.]

Appeal from order of the General Term of the Supreme Court reversing a judgment in favor of plaintiff entered upon the report of a referee and granting a new trial.

This action was brought to recover \$2,800 originally owing by Francis D. Hoyt to the plaintiff, which, plaintiff alleged, the defendants by an instrument in writing had agreed to pay.

The facts, so far as material, are stated in the opinion.

Marcus T. Hun, for appellant.

Esek Cowen, for respondents.¹

O'BRIEN, J.—This case depends upon the construction which should be given to the written contract upon which the plaintiff brought the action and recovered before the referee. The General Term has taken a different view with respect to the meaning and effect of the paper, and reversed the judgment.

There is no dispute with respect to the fact that Francis D. Hoyt was indebted to the plaintiff in the amount of the judgment. The question is whether the defendants have ever become bound to pay that debt.

On the 21st of August, 1868, Hoyt was also indebted to the defendants, composing a mercantile firm engaged in business at Providence and in New York, in the sum of \$13,510.89, and on that day he executed and delivered to them a written instrument reciting the indebtedness and the consideration thereof, and stating that for the purpose of securing and paying this debt, Hoyt had on that day sold, assigned, and delivered to them all his stock of goods, books, accounts, bills receivable, and fixtures in his business in New York, as per bill of sale that day executed and delivered to the defendants. The paper then concluded with the following provision, upon which the plaintiff brings this action :

And whereas, the party of the first part is justly indebted to Mrs. Abby Rogers Clark in the sum of twenty-eight hundred dollars for money loaned, and to Edward W. Davenport in the sum of twenty-five hundred dollars for money loaned.

Now, in consideration of the premises and the sum of one dollar paid to the party of the first part by the parties of the second part, the parties of the second part hereby agree to guarantee to the said Abby Rogers Clark and Edward W. Davenport the payment to them and each of them of the said sums of money so owing to them as aforesaid, within five years from the date thereof, with interest.

¹ The arguments are omitted.

The defendants admit the execution and delivery of this agreement, but deny that there was any sufficient consideration therefor and for a further defence allege that Hoyt falsely and fraudulently represented that the goods so transferred were of sufficient value to pay their debt and also that of the plaintiff and the other party named in the instrument; that in sole reliance upon such representations and statements the defendants accepted the transfer; and that such statements were untrue. The referee found that by an inventory and appraisal of the goods so transferred, made by the parties shortly after the transfer, the value thereof appeared to be between \$14,000 and \$15,000; and after numerous other findings he held as a conclusion of law that the defendants, under the circumstances of the case, and by the terms of the instrument, promised absolutely to pay the plaintiff's debt within five years. The view of the General Term was substantially that since there was no privity of contract or consideration between the plaintiff and the defendants, the clause of the contract quoted amounted to nothing more than a promise on the part of the defendants to lend to Hoyt money with which to pay the plaintiff's debt against him, and that the plaintiff was not entitled to sue upon such a promise.

It is quite evident from what appears in the record that this point was first suggested on appeal, and that the case was tried upon a different theory. The defendants' understanding and construction of the instrument is thus stated by them in their answer. After stating the fraudulent representations as to the value of the property transferred, made by Hoyt, the answer avers:

"That relying solely upon the said representations so as aforesaid made, and, believing them to be true, the defendants agreed to accept a transfer of and to take possession of said property, and, and to dispose of the same to the best advantage, and out of the proceeds to repay the indebtedness of said Hoyt to the defendant and to use any surplus in paying the alleged indebtedness of said Hoyt to the plaintiff and said Davenport."

The defendants themselves by their answer have thus given to the contract an interpretation quite different from that now claimed. The issue which was litigated at the trial was substantially one of fact, founded upon the defence of fraud, and which the referee decided adversely to the defendants. In anticipation of this result, apparently, the defendants requested the referee to hold as matter of law that they received the property and its proceeds as trustees for the purpose of disposing of the same and out of the proceeds to pay their own claim and that of the plaintiff and Davenport *pro rata*, and that plaintiff's *pro rata* share of the proceeds with interest, amounting, to \$2,004.20, was the sum for which the plaintiff was entitled to judgment.

The referee refused so to hold and held as already stated, that the plaintiff was entitled to recover the whole debt as upon an absolute promise to pay, made by defendants to the plaintiff or for her benefit.

At the request of the defendants the referee found as matter of fact that the transfer of the property by Hoyt to the defendants was made for the purpose and with the intent that the same should be sold to the best advantage and the proceeds applied to the payment of the indebtedness of said Hoyt to the defendants and the plaintiffs and said Davenport as and in the manner mentioned in said agreement. It is quite apparent from the answer and the whole course of the trial that the theory upon which the defendants succeeded at the General Term was not the theory upon which they rested their defence at the trial. But the defendants were entitled in the court below, and are entitled here, to urge any ground of defence that is fairly presented by the record. It does not follow that because the defendants met with a larger measure of success at the General Term than they even claimed before the referee that they are wrong in the position which they now assume. The legal liability of the defendants for the payment of the plaintiff's debt against Hoyt, upon the facts and circumstances found by the referee, is still open to debate in this court.

The plaintiff was not a party to this agreement and did not even know of its existence until some time after it was made. There was no consideration for the promise moving from the plaintiff to the defendants, and the plaintiff neither waived nor released any right or claim that she had against Hoyt, her original debtor. There is no question in the case with respect to the Statute of Frauds, since the defendants' promise, whatever its legal character may be, is in writing signed by the parties to be charged.

The common debtor of the three creditors named in the instrument transferred and delivered all his property to the defendants, and in consideration of such transfer the defendants bound themselves according to the tenor and meaning of the writing. The defendants received all that the debtor had for distribution among his creditors, and in consideration thereof, among other things, agreed to guarantee to the plaintiff the payment to her within five years of her debt. Whatever the defendants bound themselves to do in this writing was, therefore, as between the parties to it, founded upon a sufficient consideration. If the writing, construed in the light of all the surrounding circumstances, imports a promise on the part of the defendants to pay the plaintiff the amount of her debt against the common debtor, in consideration of the transfer by the latter to the defendants of all his property, the plaintiff may maintain an action on this promise, though she was not privy to the contract or consideration. It is then the case of a promise made by the defendants, upon a valid consideration, to a third person for the plaintiff's benefit. *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 N. Y. 178. Where a debtor transfers property to a third person in consideration of his promise to pay the debt to the creditor, the latter may accept and adopt the promise when it becomes known to him and maintain an action upon it. When the promise in such cases is the consid-

eration or condition upon which the third party has received the debtor's property, he thereby makes the debt his own and assumes an independent duty of payment, irrespective of the liability of the principal or original debtor.¹ It appears that the plaintiff, some time before the commencement of the action, demanded payment of the debt from the defendant, so that there can be no question as to the acceptance or adoption of the promise.

It becomes important, therefore, to determine whether the promise contained in the instrument is, in fact, an original and absolute one to pay the debt or collateral merely. That must depend upon the intention of the parties, to be ascertained from the language used and from all the surrounding circumstances. The findings of the referee, when read together and considered in the light of what is to be fairly implied, as well as what is expressed, import that the defendants, by this instrument, intended to and did promise to pay the plaintiff's debt absolutely. This conclusion is necessarily involved in the findings, if not expressly found in terms, and we may consider all the facts found and the evidence in the record, in order to give the decision its proper force and construction. *Ogden v. Alexander*, 140 N. Y. 356.

The judgment of the referee has been reversed upon the ground that the instrument, when considered with the other facts and circumstances of the case, found or conceded, creates no legal liability against the defendants for which the plaintiff can maintain an action. We are not inclined to agree to this view of the case. The character of the defendants' promise is not to be determined solely with reference to the language employed. Words to the effect that a third party will see the debt paid, or become responsible or the like, have been held to import an original and absolute promise when taken in connection with the facts and circumstances of the transaction.²

It is true that the meaning of such words, whether imputing an original or collateral promise, has been discussed mostly in cases where the Statute of Frauds has been relied upon as a defence, still the same principle will apply in any case where it is material to determine whether a promise is original or not. If the defendants intended to and did make this debt their own by a promise founded upon a new and original consideration of benefit to the defendants, moving to them from the debtor, the fact that the debt may still subsist against the original debtor is no objection to a recovery.³ The true construction of the whole transaction is that the original debtor put a fund or property into the hands of the defendants by absolute transfer upon their promise to

¹ *Citing*, *F. Nat. Bank v. Chalmers*, 144 N. Y. 432; *White v. Rintoul*, 108 N. Y. 222; *Townsend v. Rackham*, 143 N. Y. 516; *Gifford v. Corrigan*, 117 N. Y. 257; *Wager v. Link*, 134 N. Y. 122.

² *Citing*, *Chase v. Day*, 17 Johns. 114; *Mountstephen v. Lakeman*, L. R. (7 Eng. & Ir. App.) 17.

³ *Citing*, *Leonard v. Vreedenburgh*, 8 Johns. 29; *Farley v. Cleveland*, 4 Cowen, 432; *Malory v. Gillett*, 21 N. Y. 412.

pay the plaintiff's debt with others ; and, although the plaintiff was not a party to the transaction, it was for her benefit, and as the promise is founded upon a new and independent consideration she may enforce it within the doctrine of the cases cited. The facts found or conceded show that such was the transaction, and that the purpose of the paper in question was to assume the payment of the plaintiff's debt in the manner stated therein.

In the first place we have the fact that the defendants executed the paper in the belief that the property transferred to them by the debtor was sufficient to pay their own debt, and also that of the other parties named. This clearly appears from the averments of their answers. It is equally clear that the defendants were informed by the debtor that the plaintiff's debt was one of honor, which he was bound to protect, since it was for money borrowed by him, and that he refused to make the transfer except upon the condition that the defendants should bind themselves to take care of this debt. It appears also that when the property was put into the possession of the defendants they employed the debtor to carry on the business as their agent, furnishing him with other goods, and that the business was so conducted for some time after the transfer. The defendants, no doubt, believed that if the property transferred should prove in any degree insufficient, the balance would be made up from the earnings of the business, and in any event they had five years within which to pay the debt. The language of the instrument when coupled with the facts and circumstances referred to, does not, we think, give much support to the theory which prevailed in the court below, that the defendants' promise imported nothing more than an agreement on their part with the debtor, and for his benefit alone, to advance to him money with which he might pay the debt in question. We think they virtually assumed it themselves upon the transfer by the debtor of all his property to them. The theory that the defendants' obligation was simply to advance money to Hoyt to enable him to pay the plaintiff's debt is sought to be supported by artificial reasoning and judicial authority, but it is not the natural legal inference to be drawn from the transaction. The cases in which such a principle was sanctioned arose upon facts quite different from these appearing in this record. *Garnsey v. Rogers*, 47 N. Y. 233.¹

There would, no doubt, be great difficulty in holding the defendants liable to the plaintiff if the proposition of their counsel that the promise was collateral, importing nothing more than that Hoyt, the debtor, would pay the debt within five years, could be admitted. Everything in the record tends to show that such was not the intention of the parties to the agreement. Neither Hoyt nor the defendants understood the promise in that way. They expected that the property transferred to the defendants would enable them to pay all the debts referred to,

¹ Given in text, *infra*.

and upon that basis the promise must have been intended to be absolute. To hold that, under the circumstances, the defendants intended nothing more than a collateral guaranty that Hoyt, after being stripped of all he had, would pay the debt within five years, would be to impute to them dishonesty in seeking to retain for themselves the property of their debtor, in excess of their debt. The reasonable and natural conclusion from all the facts is that the defendants intended to pay this debt to the plaintiff out of the property of the debtor which they received, and so bound themselves. That was the condition upon which the debtor made the transfer.

The nature of the defendants' undertaking is not affected by the fact that less was realized from the property than was expected when the transfer was made. The intention of all the parties to the writing is to be ascertained from the facts, existing at the time it was made, or the situation as they then understood it, not by what took place or was disclosed afterwards. If the defendants supposed that they were receiving property from the debtor to pay not only their own debts, but also that of the plaintiff and the other creditor named, the conclusion is inevitable that they intended to bind themselves to pay these debts. That they did so understand the situation at the time that they made the promise, clearly appears from the record. The fact that in the writing the defendants agreed to *guarantee* the payment to the plaintiff, instead of agreeing to pay, does not control the interpretation of the contract. The intention of the parties and the scope and meaning of the promise is to be ascertained from the nature of the transaction and all the attending facts and circumstances as well as the written words.

Our conclusion is that the promise should be interpreted as an absolute one on the part of the defendants to pay the plaintiff's debt; that it is supported by a sufficient consideration moving from the debtor to them, namely, the transfer of his property for that purpose, and that the legal conclusion of the referee was correct.

It follows that the order and judgment appealed from should be reversed and the judgment entered upon the report of the referee affirmed, with costs in all courts.

All concur.

Ordered accordingly.

2. *The limitations which attach to the third person's right of action, in case of a contract between others for his benefit.*

NOTE.—The "broad principle that if one person makes a promise to another for the benefit of a third person, this third person may maintain an action on the promise," while assented to without restriction in many cases, is limited and qualified in many others; and even when the opinion leaves the doctrine quite at large, the facts of the case in hand often warrant a material restriction. Just where the line should be drawn is however not yet defined; in several of its aspects the *ratio decidendi* is still open to question. The restrictions which attach to contractual relations in general are, of course, to be observed. Cf. *Howsman v. Trenton Water Co.* (1893), 119 Mo. 304, given in the text, *infra*. It is equally clear that whatever right of action the third person has because of his contract, that right "can not be broader than that which the party to the contract, through whom the right of action is derived, would have in the event of its breach." The outside beneficiary "can not acquire a better standing to enforce the agreement than that occupied by the contracting parties themselves." *Ellis v. Harrison* (1891), 104 Mo. 270, 277. But very many cases which turn upon the third person's right of action, in case of a contract between others for his benefit, require further and more special limitations.

(a) Is it sufficient that the performance of a contract, valid between its parties, would certainly result in a material benefit to the third person; or must his benefit appear as the direct aim and purpose of the contract?

(b) Is it sufficient if a valid contract and an intended benefit to the third person appear; or must the promisee in the contract be under some legal or equitable obligation, within the scope of the contract, to the third person for whose benefit the contract is made?

These two aspects are often blended in the same case, but for the sake of clearness of view they will be presented under separate heads.

(A) *The Benefit of the Third Person as the Purpose of the Contracting Parties.*

GARNSEY v. ROGERS ET AL.

COURT OF APPEALS OF NEW YORK, JANUARY, 1872.

[47 N. Y. 233.]

Appeal from a judgment of the General Term of the Supreme Court reversing a judgment upon the report of a referee in favor of the plaintiff.

On and prior to the 23rd of January, 1861, the plaintiff, Lewis R. Garnsey, was the owner of two mortgages upon the property described in the complaint, one given to him directly, the other acquired by him through purchase and assignment from its original mortgagee. At the date mentioned, the premises covered by these mortgages were owned by the defendant Richard M. Hermance, who had assumed and agreed to pay them. At this time they amounted together to the sum of \$2,000, besides an accumulation of interest.

On the 23rd of January, 1861, Hermance was indebted to the defendant Harvey J. Rogers, in the sum of \$650. To secure the payment of this sum, Hermance executed and delivered to Rogers a deed of the

premises covered by the mortgages, containing a covenant on the part of Rogers that he would assume and pay the said mortgages. This deed was given, however, upon the parol condition that whenever Hermance should pay the said \$650 and interest to Rogers, the premises should be reconveyed by him to Hermance.

On the 1st of August, 1866, Hermance gave Rogers his note for \$700, and on the same day Rogers reconveyed the premises to Hermance by deed, in which Hermance covenanted to reassume and pay these mortgages.

Upon these facts the referee found, as a conclusion of law, that in case the amount of the mortgages could not be collected from a sale of the land itself, nor from the defendant Hermance, then and in that case the defendant Rogers was liable for the same. To this conclusion the defendant Rogers excepted.

Upon the report of the referee judgment was entered, charging the defendant Harvey J. Rogers with any deficiency which might arise upon the sale of the mortgaged premises, in case such deficiency could not be collected of the defendant Hermance. From this portion of the judgment the defendant Rogers appealed.

W. F. Odell, for appellant.

E. Cowen, for respondent.¹

RAPALLO, J.—The liability of a grantee who accepts a conveyance by the terms of which he assumes the payment of an existing mortgage upon the land, to respond directly to the mortgagee for a deficiency, in case of a foreclosure and sale, was first adjudged in this state in the case of *Halsey v. Reed* [1842], 9 Paige, 445. That adjudication was followed in the cases of *Marsh v. Pike*, 10 Paige, 597; *Cornell v. Prescott*, 2 Barb., S. C., 16; *Blyer v. Monholland*, 2 Sandf. Ch., 478, and other cases. In these cases, the sole ground upon which the liability of the grantee was placed, was that as between the grantor and the grantee, the grantee, by such an agreement, became the principal debtor of the mortgage debt, and the grantor stood in the situation of surety for him. That the agreement of the purchaser was given for the indemnity of the vendor, who thus stood in the relation of surety for him, and that the mortgage creditor was entitled to the benefit of such indemnity, upon the principle that where a surety or person standing in the situation of surety for the payment of a debt, receives a security for his indemnity and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security, though he did not even know of its existence. *Curtis v. Tyler*, 9 Paige, 432.

In *King v. Whitely* [1843], 10 Paige, 465, this was declared to be the principle of all the cases in which it was held that such a stipulation inured to the benefit of the mortgagee; and consequently it was held in

¹ The arguments are omitted.

that case that when the grantor, in whose conveyance such a stipulation was contained, was not himself personally liable for the mortgage debt, the holder of the mortgage acquired no right to resort to the grantee for payment.

In the last case cited, the chancellor distinctly repudiates the idea of any right being acquired by the holder of the mortgage, in case of such agreement, on the ground that it was a contract made between the grantor and the grantee, for the benefit of the mortgagee. And he refers to the older English cases which were cited in support of the doctrine, that if one person makes a promise to another, for the benefit of a third, that third person may maintain an action on the promise, and shows that that principle applies only to third persons for whose special benefit the promise was intended, and that they rest upon the ground that the person obtaining the promise, and from whom the consideration proceeded, intended it for the benefit of the third person.

The case of *Russell v. Porter*, 3 Seld. 171, recognizes the ground of liability to be that stated by the chancellor, and in the case of *Trotter v. Hughes*, 2 Ker. 74, the doctrine of *King v. Whitely* was adopted; and it was accordingly held that although accepting a deed, containing such a stipulation, from a party personally liable to pay the mortgage, rendered the grantee liable to the mortgagee, yet the assumption of the mortgage, in a deed from a party not liable to pay it, did not make the grantee liable, inasmuch as the only ground of liability was that of equitable subrogation of the creditor to all securities held by the surety of the principal debtor; and the grantor who was not personally liable for the mortgage debt did not stand in the situation of surety. Such was, in all the cases upon the subject, recognized as the sole ground of liability until the case of *Burr v. Beers* [1861], 24 N. Y. 178, which was an action at law, in which the mortgagee had recovered a personal judgment for the mortgage debt, against a grantee who had accepted a deed containing the usual clause whereby he assumed the payment of a mortgage which was a lien upon the premises. Denio, J., in delivering the opinion of the court, after referring to the previous cases upon the subject, agrees that they do not proceed upon the notion of a contract between the owner of the equity of redemption and the holder of the mortgage, but upon the principle that the undertaking of the grantee to pay off the incumbrance is a collateral security obtained by the mortgagor, which inures, by an equitable subrogation, to the benefit of the mortgagee, and that the judgment under review could not be sustained on the doctrine of those cases, the action not being for a foreclosure of the mortgage, and the mortgagor not being a party. But upon the authority of *Lawrence v. Fox*, 20 N. Y. 268, the judgment was sustained on the broad principle that if one person make a promise to another for the benefit of a third person, that third person may sustain an action upon the promise.

The application of that principle made in the case of *Lawrence v. Fox* has been the subject of much discussion, which it is not proposed to renew here. The case of *Burr v. Beers*, though in conflict with *Mullen v. Whipple*, 1 Gray, 317, and apparently, in conflict with *King v. Whitely*, 10 Paige, 465, and *Trotter v. Hughes*, 2 Ker. 74, may well be sustained for the reasons mentioned by Chancellor Kent, in *Cumberland v. Codrington*, 3 Johns. Ch. 254, 258, 261, where he intimates that a special agreement between the purchaser and seller of the equity of redemption, by which the amount of the mortgage debt is considered as so much money left in the hands of the purchaser for the use of the mortgagee, would be sufficient ground for a suit at law by the mortgagee.

The cases to which reference has been made exhibit, I believe, every ground upon which it has been hitherto claimed that a grantee who, by agreement with his grantor, assumes the payment of an existing mortgage on the premises conveyed, becomes personally liable to the mortgagee; and the material question now to be considered is, whether the principles of any of these cases apply to such an agreement when contained, not in an absolute conveyance, but in a mortgage, or in a conveyance which in equity amounts only to a mortgage, and impose upon the second mortgagee making such an agreement, an absolute, continuing, personal liability, which can be enforced by the first mortgagee against the second.

The conveyance from Hermance to Rogers is found by the referee to have been intended only as a security for an existing debt, and accompanied by an agreement for redemption, and must in equity be treated as a mortgage and nothing more. The covenant therein, whereby Rogers assumed the payment of the prior mortgages held by the plaintiff, should therefore be construed as if contained in a mortgage. It having been established, by repeated adjudications, that a deed, though absolute on its face, may be proved by parol to have been given as security for a debt, and that when that fact is established it is defeasible by redemption, and vests in the grantee only the rights of a mortgagee, consistency requires that the character thus given to the instrument should affect all its parts, and that the obligations which it purports to impose upon the grantee should have no greater effect than if the defeasance which is proved by parol had been incorporated in the instrument; especially when third parties claim equitable rights under such covenants.

Assuming for the moment that in such a case the agreement of the grantee or mortgagee to pay off prior incumbrances is founded upon a sufficient consideration, it is still difficult to see how it can be brought within the principle of the earlier cases cited, they being all founded upon the doctrine that as between the grantor and grantee the latter becomes the principal debtor for the mortgage debt, which has been

allowed him out of the purchase money. Where he takes only a mortgage he owes no money for the land, which he can promise to pay to the prior mortgagee, for he does not acquire title to the land. To become a debtor to any one he must owe a debt. Where he buys the land absolutely for a stipulated price, and instead of paying the whole of it to his grantor, he is allowed to retain a part which he agrees to pay to a creditor of the grantor having a lien upon the land, the amount which he thus agrees to pay is his own debt, which by arrangement with his grantor he has agreed to pay to the creditor of the latter, and although this arrangement, not being assented to by the creditor, does not discharge the grantee from liability, yet as between him and the party who has thus assumed it, the grantor is a mere surety. If the grantee pays it, he pays only what he agreed to pay for the land, and pays it in the manner agreed upon. And there is no hardship in allowing either the grantor or the mortgagee to enforce its payment. But in the case of a party having the land merely as security, such an undertaking is simply a promise to advance money to pay the debt of his grantor or mortgagor, which money when advanced the junior mortgagee can collect under his mortgage. *Western Insurance Co. v. Village of Buffalo*, 1 Paige, 284. If Rogers had paid the lien in question, and on a foreclosure of his own mortgage the premises had not brought enough to satisfy it together with the sum paid by him to discharge the prior liens, Hermance would have been liable to him for the deficiency.

Where a party, taking from his debtor a lien on property subject to prior liens, assumes and pays them off he is certainly entitled to add the amounts so paid to his original debt; the payments, though made in pursuance of his agreement, are made for the benefit of the debtor, and upon his debts and to protect him and his property. It is obvious that an agreement of this character is a mere agreement to advance, and not a security in the hands of the grantor as surety, available to the parties in whose favor the prior liens exist, on the ground of equitable subrogation.

The judgment can not be sustained on the principles which prevailed prior to the case of *Burr v. Beers*, 24 N. Y. 178, and the next inquiry is whether it can be sustained on the doctrine of that case.

Was this a promise made to Hermance for the benefit of the plaintiff? I do not understand that the case of *Lawrence v. Fox* has gone so far as to hold that every promise made by one person to another, from the performance of which a third would derive a benefit, gives a right of action to such third party, he being privy neither to the contract nor the consideration. To entitle him to an action, the contract must have been made for his benefit. He must be the party intended to be benefited; and all that the case of *Lawrence v. Fox* decides is, that where one person loans money to another, upon his promise to pay it to a third

party to whom the party so lending the money is indebted, the contract thus made by the lender is made for the benefit of his creditor, and the latter can maintain an action upon it without proving an express promise to himself from the party receiving the money. Johnson, C. J., and Denio, J., placed their votes upon the distinct ground that the contract could be regarded as having been made by the debtor as the agent of his creditor, and that the latter could ratify the contract thus made for his benefit. In *Burr v. Beers*, 24 N. Y. 178, the amount due upon the mortgage was reserved out of the purchase money and left in the hands of the purchaser, upon his agreement with the vendor to apply it to the payment of the mortgage debt. The purchaser was bound to pay the whole price, but by this agreement a portion of it was set apart for the use of the mortgagee, and the purchaser undertook to pay it to the mortgagee, and no one else. No other person was entitled to receive it. That arrangement was regarded as a contract made for the benefit of the mortgagee, and it was held that he could enforce it. In that case the purchase money was in fact a fund in the hands of the purchaser, which he had agreed to apply to the use of the mortgage creditor. In performing that agreement he would have done nothing more than pay his own debt in the manner in which he had agreed to pay it.

But in the present case the agreement was not to apply money which the promisee delivered for the purpose, or which was due him from the promisor, to the use of a third party, but the promisor engaged to advance his own money for the purpose of protecting the property of the promisee, which advance when made would become a lien on the property of the promisee. Regarding the conveyance as a mortgage, the stipulation was in effect to advance to the promisee on the security of the property, to discharge prior liens, and was made for the benefit of the promisee only.

If such a contract could be enforced by the creditor who would be incidentally benefited by its performance, every agreement by which one party should agree with another, for a consideration moving from him, to become security for him to his creditors, or to advance money to pay his debts, could be enforced by the parties whose claims were thus to be secured or paid. I do not understand any case to have gone this length. This is not the case of a trust. If the property had been conveyed to Rogers, in trust, to pay the plaintiff's claims, the legal estate would have vested in Rogers, and he would have been compelled to execute the trust. But no such trust was declared in the deed, nor could it be created by parol, as to real estate.

It must further be considered that, where such an assumption is made on an absolute conveyance of land, it is unconditional and irrevocable. The grantor can not retract his conveyance, or the grantee his promise or undertaking; but, when contained in a mortgage, the con-

veyance is defeasible. The grantor reserves the right to annul it by paying his debt, and when he does so, he discharges the agreement to pay the prior mortgage. The reservation of this right is inconsistent with the idea that the assumption by the grantee was for the benefit of the prior mortgagee; for, if it were, the grantor would have no control over the rights thus acquired by a third party. The reservation of this control by the grantor shows that the agreement was for his benefit only, and prevents its inuring to the benefit of any third party. In the present case the control had actually been exercised, and the grantor had redeemed and resumed the enjoyment of his property, in pursuance of the condition before this action was commenced, and the grantee had ceased to have any interest in or claim upon it.

I am not quite prepared to hold that the agreement of the defendant, to pay the prior mortgages, was absolutely void for want of consideration.

In the case of *Ricard v. Sanderson*, 41 N. Y., 179, the property was placed in the hands of Sanderson for the purpose of securing debts due not only by the grantor, but by others, and not to Sanderson individually, but to a firm of which he was a member. The agreement was in writing, and its terms are not given in the case as reported, and it may be that they created a trust in Sanderson, and that the legal title was vested in him. Moreover, the case does not show that the instrument or the title, or possession of Sanderson under it, had at the time of the recovery against him been extinguished or terminated in pursuance of any condition to which it was subject.

It may be that constituting Rogers mortgagee in possession, of real estate exceeding in value the amount of his debt, was a consideration for the undertaking of Rogers to advance the money necessary to pay off the prior liens, and that while the mortgage remained in force, and Rogers continued in possession, Hermance could have compelled the performance of that agreement for the protection of his own estate. It is true that the giving of the security was less, so far as the defendant was concerned, than Hermance was already under a legal obligation to do. It was not so beneficial to the defendant as would have been the payment of his claim. But at the same time it was an act which Hermance was not legally bound to perform, and which might be prejudicial to him; and it was not unreasonable that when he parted with the possession of his property, and added to the previous incumbrances thereon, thus disabling himself from protecting it, he should exact of the party to whom he thus gave it as security, that he should protect it; and the latter may have been willing to bind himself to do that which, without any agreement, he might have been obliged to do to protect his own security. A stipulation by the mortgagee in possession to keep down prior mortgages, taxes, etc., might, perhaps, be enforced by the mortgagor. But when the mortgage is canceled, and the mortgagor is

restored to the enjoyment of the property, such stipulations are extinguished with the mortgage.

The judgment should be affirmed with costs.

All concur.

*Judgment affirmed.*¹

¹ See also *Crowell v. Hospital of St. Barnabas* (1876), 27 N. J. Eq. 650, 657; *Arnaud v. Grigg* (1878), 29 N. J. Eq. 482; *Pardee v. Treat* (1880), 82 N. Y. 385; *Root v. Wright* (1881), 84 N. Y. 72; *Meech v. Ensign* (1881), 49 Conn. 191, 209; *Peacock v. Williams* (1887), 98 N. C. 324; *Savings Bank v. Thornton* (1896), 112 Cal. 255, 259.

In *The State v. St. Louis & San Francisco Ry. Co.* (1894), 125 Mo. 595, 615, the defendant railway company had agreed to "save harmless" another railway company against the claims of third persons. Said the Court: "Persons who are not parties to a contract may acquire rights under it by assignment and by novation. In such cases they become parties thereto. But the general rule is that strangers to a contract can not sue upon it. There are, however, some exceptions to this rule. One is that where property is placed in the hands of another person who agrees to deliver the property or the proceeds arising from the sale thereof to a third person, such third person has a cause of action against the person in whose hands the property was placed. There is another exception more in point in this case, asserted by most of the courts in this country. This exception may be stated as follows: Where one person, for a valuable consideration, makes a promise to another for the benefit of a third person, such third person may maintain an action upon the promise. This principle has found a strong foothold in the former adjudications of this court. It was first limited to promises contained in simple contracts. *Bank v. Benoist*, 10 Mo. 519; *Robbins v. Ayres*, 10 Mo. 538; *Meyer v. Lowell*, 44 Mo. 328; *Flannagan v. Hulchinson*, 47 Mo. 237. But it was subsequently extended so as to apply to covenants—contracts under seal. *Rogers v. Gosnell*, 51 Mo. 466; S. C. 58 Mo. 589; *Fitzgerald v. Barker*, 70 Mo. 687; S. C. 85 Mo. 14. It is not necessary to specify the debts which the promisor or covenantor assumes and agrees to pay. It is enough to speak of them as a class, and the particular debt in question may be shown to be one which falls within that class. *Schuster v. Railroad*, 60 Mo. 290; *Schmidt v. Glade*, 126 Ill. 485; *Snell v. Ives*, 85 Ill. 279; *Brenner v. Luth*, 28 Kan. 581.

"This brings us to the far more difficult question, whether the state can maintain this suit against the St. Louis & San Francisco Railway Company, on the tripartite agreement of the thirty-first of January, 1880. It may be observed here that the principle of law before stated, namely, that, where one person makes a promise to another for the benefit of a third person, such third person may sue on the promise, must be kept within reasonable bounds. To entitle a third person to sue it must clearly appear that the contract was made for the benefit of such third person or persons, as one of its principal objects. *Housmon v. Trenton Water Co.*, 119 Mo. 306. A mere indirect or incidental benefit is not sufficient. *Burton v. Larkin*, 36 Kan. 246; *Bank v. Grand Lodge*, 98 U. S. 123. If the agreement or covenant is simply one to indemnify and save harmless one of the parties to the contract, against the claims of third persons, then such third persons can not sue upon the agreement or covenant. Such a contract, whether under seal or not, is not a contract for the benefit of third persons within the meaning of the exception to the general rule. *Kansas City ex rel. v. O'Connell*, 99 Mo. 357; *Weller v. Goble*, 66 Iowa, 113; *Housmon v. Trenton Water Co.*, *supra*.

"Now, to understand this tripartite agreement we must first see what were the leading objects sought to be accomplished by it. Two of the companies, the Atchison and the San Francisco, owned and operated separate but connecting lines. They desired to build a further connecting line from a point in New Mexico west to the Pacific coast, and to operate the whole as a continuous line under a traffic agreement. In building the new line they desired to avail themselves of the charter and land grant of the Atlantic & Pacific Company. These were the leading objects in view. To accomplish them the Atchison and San Francisco companies acquired seven-eighths of the stock of the Atlantic & Pacific. That company was insolvent, and many of its debts were secured by mortgages on the road owned and operated by the San Francisco Company. As the new road was to be built to a large extent by aid furnished by the two solvent companies, they undertook to determine which should, as between themselves, liquidate the debts of the Atlantic & Pacific. To that end they made the schedule of debts and liabilities of the Atlantic & Pacific, before set out; but they were careful to say valid defences might exist as to some of them. The San Francisco Company then agreed to and with the other companies first, 'to take up, pay and cancel and surrender canceled, to the party of the second part (Atlantic & Pacific Co.), all the overdue coupons on the bonds of said party of the second

CAMPBELL *v.* SMITH.

COURT OF APPEALS OF NEW YORK, OCTOBER 2, 1877.

[71 N. Y. 26.]

Appeal from order of the General Term of the Supreme Court, reversing a judgment in favor of the defendant, entered upon a decision in a trial without a jury.¹

This action was brought by plaintiff as assignee of a bond and mortgage executed by Maria C. Hood upon premises in Brooklyn, to recover a deficiency arising upon foreclosure sale, upon an alleged covenant in a deed from said Maria C. Hood to defendant, assuming and agreeing to pay the mortgage.

The courts found, in substance, among other things, that the mortgagor, in pursuance of an agreement of sale made with one Burtis, executed and delivered to the latter a deed of the premises which recited that the amount of the mortgage was deducted from the purchase-price, and the conveyance was subject thereto; and contained a covenant on the part of the grantee to pay the same. The name of the grantee was left blank, and Burtis was authorized to insert the name of any person or grantee. Burtis thereafter, being indebted to a firm of which defendant was a member, agreed with the latter that he would insert his name in the deed, and that any profits arising from a sale or other disposition of the premises should be applied upon said indebtedness.

part now outstanding; second, and also agrees to save the parties hereto of the second and third part, severally, harmless from all bonds, script, debentures, floating debt, and other obligations and liabilities of the party of the second part, as well against such as are hereinbefore enumerated, classified and described, as any and all others now existing, and to pay and surrender the same cancelled and discharged to the party of the second part as fast as the same are obtained by the party of the first part, by payment or otherwise,' excepting, however, the bonds scheduled at \$1,189,905, and at \$795,000.

"There is a marked difference between the two clauses of the contract. In the first there is an undertaking on the part of the San Francisco Company to pay the overdue coupons. The state's demand does not come within that clause. By the second clause the San Francisco Company agrees to save the other contracting companies harmless from the other obligations and liabilities of the Atlantic & Pacific Company whether scheduled or not. This is the clause upon which the state does, and must, rely. Thus far this clause is nothing more than an agreement to save the other parties harmless, that is to say, an agreement of indemnity. It is true this clause goes on to say the San Francisco Company shall 'pay and surrender the same, canceled and discharged, to the second party as fast as the same are obtained by the party of the first part, by payment or otherwise;' but these words are subordinate to the agreement to save harmless, and were designed to give a further expression to the same thought. They can not have the effect to change the agreement from one of indemnity to a contract made for the benefit of third persons. It was certainly never intended that the San Francisco Company should pay any obligation to which the Atlantic & Pacific Company had a defence of any kind. Taking the contract as a whole and keeping in view its general object and purpose, it is simply an adjustment of affairs as between the parties thereto, and was never designed or intended to be a contract for the benefit of third persons."—*PER* BLACK, P. J.—*Ed.*

¹ Reported below, *Campbell v. Smith* (1876), 8 Hun, 6.

Burtis thereupon inserted defendant's name as grantee in the deed, and had the same recorded, with defendant's knowledge and consent. Burtis thereafter procured a purchaser, and defendant at his request conveyed the premises subject to the mortgage, the deed containing a similar covenant. Plaintiff subsequently foreclosed his mortgage without making defendant a party, and upon foreclosure sale a deficiency arose. Defendant's grantee was made a party to the foreclosure sale, but no judgment for any deficiency was demanded or taken against him.

The court found that the deed was accepted by defendant as security for the indebtedness of Burtis to defendant's firm and that defendant was entitled to judgment. Judgment was entered accordingly.

D. P. Barnard, for appellant.

J. T. Marcan, for respondent.¹

CHURCH, CH. J.—We concur with the General Term that the case of *Garnsey v. Rogers*, 47 N. Y. 223, is not controlling in favor of the defendant. In that case a debtor conveyed to his creditor certain premises by deed as security for his debt, and it was held that an agreement in the deed that the creditor would pay a prior incumbrance was for the benefit and protection of the debtor, and did not inure to the benefit of the holder of the incumbrance, within *Lawrence v. Fox*, 20 N. Y. 268, and kindred cases; and that upon the payment of the debt, and a reconveyance of the premises to the debtor, with the assumption upon the part of the latter of the incumbrance, the creditor was released from all obligation upon his covenant in the deed. Here no such relation existed between Hood, the grantor, and the defendant. The former conveyed absolutely all her interest in the premises, and the defendant, by consenting to the insertion of his name as grantee, and accepting the conveyance, occupied the position of purchaser. As between them the relation of grantor and grantee existed, with all the rights and obligations incident to that position. The covenant to pay the mortgage was absolute, and the mortgagee had the right to enforce it. The principle that when A. for a valuable consideration, agrees with B. to pay his debt to C., the latter can enforce the contract against A., has been repeatedly adjudicated, and is applicable to the transaction developed in this case.²

The transaction with Burtis did not impair the right of Hood, nor the plaintiff as assignee of the mortgagee. That was an arrangement collateral to the deed, and affected only the parties to it. The relative rights of Burtis and the defendant are not involved in this action. The defendant consented to occupy the position of grantee in the deed, under an agreement with Burtis, which can not affect the plaintiff.

¹ The arguments are omitted.

² Referring especially to *Lawrence v. Fox* (1859), 20 N. Y. 268; *Burr v. Beers* (1861), 24 N. Y. 178; *Ricard v. Sanderson* (1869), 41 N. Y. 179; *Thorp v. Keokuk Coal Co.* (1872), 48 N. Y. 253.

It is unnecessary to consider whether the defendant is entitled in equity to the right of redemption. . . .¹

The judgment must be affirmed.

All concur.

*Judgment affirmed.*²

NATIONAL BANK v. GRAND LODGE.

SUPREME COURT OF THE UNITED STATES, OCTOBER, 1878.

[98 U. S. 123.]

Error to the Circuit Court of the United States for the Eastern District of Missouri.

This is an action by the Second National Bank of St. Louis, Missouri, against the Grand Lodge of Missouri of Free and Accepted Ancient Masons, to compel the payment of certain coupons formerly attached to bonds issued in June, 1869, by the Masonic Hall Association, a corporation existing under the laws of the State of Missouri, in relation to which bonds the Grand Lodge, on October 14, 1869, adopted the following resolution:

"Resolved, that this Grand Lodge assume the payment of the two hundred thousand dollars bonds issued by the Masonic Hall Association, provided that stock is issued to the Grand Lodge by said association to the amount of said assumption of payment by this Grand Lodge, as the said bonds are paid."

The court below instructed the jury, that, independently of the question of the power of the Grand Lodge to pass the resolution, it was no foundation for the present action, and directed a verdict for the defendant.

The jury returned a verdict in accordance with the direction of the court; and the judgment having been entered thereon, the plaintiff sued out this writ of error.

Mr. John C. Orrick, for the plaintiff in error.

Mr. John D. S. Dryden, *contra*.

¹ Part of the opinion, on another point, is omitted.

² See also *Smith v. Truslow* (1881), 84 N. Y. 660. Distinguished, *Roe v. Barker* (1880), 82 N. Y. 431, 435: "The learned counsel for the appellant endeavors to save this case from the effect of the decision referred to, (*Garnsey v. Rogers*, 47 N. Y. 237) in several ways. He claims that upon the evidence this was an absolute sale. That could not be where the right of redemption was reserved, and that fact is not disputed. He suggests that in *Garnsey v. Rogers* the right of redemption had been exercised before the commencement of the action, while in the case at bar it had not. The difference is immaterial. The rule depends upon the existence of the right and not upon its exercise. While that remains the promise, if made, is not absolute, and is plainly intended solely for the benefit of the other party to the contract, and not at all for that of the creditor. That it may result in a benefit to him is not enough to give him an absolute right of action. The cases cited by the learned counsel for the appellant do not conflict with this rule. (*Ricard v. Sanderson*, 41 N. Y. 179; *Cooley v. Howe Machine Co.*, 53 N. Y. 620; *Campbell v. Smith*, 71 N. Y. 26.) In all of them the covenants to pay are absolute and the liability fixed, and it was upon that distinct ground that the creditor's right of action was sustained."—*Per FINCH, J.*

MR. JUSTICE STRONG delivered the opinion of the court.

It is unnecessary to consider the several assignments of error in detail, for there is an unsurmountable difficulty in the way of the plaintiff's recovery. The resolution of the Grand Lodge was but a proposition made to the Masonic Hall Association, and, when accepted, the resolution and acceptance constituted at most only an executory contract *inter partes*. It was a contract made for the benefit of the association and the Grand Lodge,—made that the latter might acquire the ownership of stock of the former, and that the former might obtain relief from its liabilities. The holders of the bonds were not parties to it, and there was no privity between them and the lodge. They may have had an indirect interest in the performance of the undertakings of the parties, as they would have in an agreement by which the lodge should undertake to lend money to the association, or contract to buy its stock to enable it to pay its debts; but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names.

We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and a defendant is necessary to the maintenance of an action of assumpsit. The subject has been much debated and the decisions are not at all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor can not sue. His case is not an exception from the general rule that privity of contract is required. There are some other exceptions recognized, but they are unimportant now. The plaintiff's case is within none of them. Nor is he sole beneficiary of the contract between the association and the Grand Lodge. The contract was made, as we have said, for the benefit of the association, and if enforceable at all, is enforceable by it. That the several bondholders of the association are not in a situation to sue upon it is apparent on its face. Even as between the association and the Grand Lodge,

the latter was not bound to pay anything, except so far as stock of the former was delivered or tendered to it. The promise to pay and the promise to deliver the stock were not independent of each other. They were concurrent and dependent. Of this there can be no doubt. The resolution of the lodge was to assume the payment of the two hundred thousand dollar bonds, issued by the association, "Provided, that stock is issued to the Grand Lodge by said association to the amount of said assumption," . . . "as said bonds are paid." Certainly the obligation of the lodge was made contingent upon the issue of the stock, and the consideration for payment of the debt to the bondholders was the receipt of the stock. But the bondholders can neither deliver it nor tender it; nor can they compel the association to deliver it. If they can sue upon the contract, and enforce payment by the Grand Lodge of the bonds, the contract is wholly changed, and the lodge is compelled to pay whether it gets the stock or not. To this it can not be presumed that the lodge would ever have agreed. It is manifest, therefore, that the bondholders of the association are not in such privity with the lodge, and have no such interest in the contract, as to warrant their bringing suit in their own names.

Hence the present action can not be sustained, and the Circuit Court correctly directed a verdict for the defendant.

*Judgment affirmed.*¹

¹ Distinguished, *Sonstiby v. Keeley* (1880), 7 Fed. Rep. 447, 450; *Pope v. Porter* (1887), 33 Fed. Rep. 7, 9. In *American Exchange National Bank v. Northern Pacific R. R. Co.*, 76 Fed. Rep. 130, before the U. S. Circuit Court, D. Washington, N. D.; HANFORD, D. J., remarked: "This is an action by the American Exchange National Bank of New York to recover a balance due to the plaintiff from the Chicago & Northern Pacific Railroad Company.

"The complaint alleges that after the debt had been contracted, the defendant, the Northern Pacific Railroad Company, entered into and made an agreement with the said Chicago & Northern Pacific Railroad Company, whereby for a valuable consideration moving from the Chicago & Northern Pacific Railroad Company to the defendant, said defendant assumed, covenanted, and agreed to pay the amount of the indebtedness of said Chicago & Northern Pacific Railroad Company to the plaintiff. The defendant has demurred to the complaint, and upon the argument its counsel relies upon the point that the plaintiff, being a stranger to the contract, can not sue the defendant.

"The explicit language of the complaint makes it clear that the promise of the defendant was to pay an existing debt, and it was made for the benefit of the Chicago & Northern Pacific Railroad Company; and no facts are alleged from which an inference may be drawn that the parties to the contract were actuated by a desire to benefit the plaintiff, nor that the scope of their intentions included any provision for rights or interests other than their own; and there is no pretence that under the contract anything of value or assets have come to the promisor's hand or under its control, which, in equity, belongs to the plaintiff or is subject to any lien existing in favor of the plaintiff. The case therefore comes fully and fairly within the rule of the decision of the supreme court in the case of *National Bank v. Grand Lodge*, 98 U. S. 123-125.

"The rule and the authority of the case cited have received express recognition in the circuit court of appeals for the Ninth circuit, in the case of *Sayward v. Dexter, Horton & Co.*, 19 C. C. A. 176, 72 Fed. Rep. 765. . . .

"Other cases cited by counsel for the plaintiff, although well considered and worthy of respect, in so far as they differ from *National Bank v. Grand Lodge* and *Sayward v. Dexter, Horton & Co.*, must be passed without other comment than this: they do not afford a pretext for ruling contrary to the decisions of the supreme court of the United States, and of the United States circuit court of appeals for this circuit. *The demurrer is sustained.*"

BURTON v. LARKIN.

SUPREME COURT OF KANSAS, JANUARY TERM, 1887.

[36 Kan. 246.]

Action to recover for goods alleged to have been sold and delivered by plaintiffs to defendants. Trial at the April Term, 1885, and judgment for plaintiff for \$469.46. The defendant Burton brings the case here.

J. B. Johnson, and J. D. McFarland, for plaintiff in error.

Lloyd & Evans, for defendant in error.

VALENTINE, J.—This was an action brought by Arthur Larkin against Howes B. Clark and Oscar A. Burton, for \$461.26, for goods, wares, merchandise, and chattels alleged to have been sold and delivered by the plaintiff to the defendants.

The action was tried by the court and a jury, and the court instructed the jury to find for the plaintiff. The jury so found, assessing the amount of the plaintiff's recovery at \$469.46, and the court rendered judgment accordingly. To reverse this judgment, Burton, as plaintiff in error, brings the case to this court, making Arthur Larkin the defendant in error.

It appears that Burton is, and has been for many years, a resident of the state of Vermont, and at one time owned a large amount of real estate in Ellsworth county, Kansas; that Clark is his nephew; that Burton sold said real estate to Clark on credit, retaining the legal title in himself as a security for the purchase-money, and also at various times loaned Clark money for the purpose that Clark might cultivate the land and carry on the business of farming and stock-raising upon the same. Clark had a family, and with his family resided upon the land. About once a year Burton and Clark had settlements of their affairs, and at each time entered into a new agreement, Burton at all times retaining the legal title to the land in himself, as a security for the payment of the purchase-money and for the money advanced by him to enable Clark to carry on the aforesaid business.

On November 22, 1883, they had a settlement, and entered into a written agreement, similar to agreements previously entered into between them, whereby Clark agreed to pay Burton \$30,650, in such amounts and at such times as he could, with interest thereon at the rate of seven per cent. per annum; and upon full payment Burton was to convey to Clark the aforesaid real estate. This agreement also contained the following stipulation, which constitutes the only foundation for the present action between Larkin and Burton, to-wit:

"It is also agreed and understood that the said party of the first part (Berton) shall furnish said party of the second part (Clark) such sums of money as may be necessary to pay the current expenses of said second party, it being understood that said second party shall render a monthly account of expenses to said first party."

After this written agreement was made, and prior to the commencement of this action, which was on December 26, 1884, the goods, wares, merchandise, and chattels for which the action was brought were sold and delivered by Larkin to Clark, and to Clark only. It is not claimed on the part of Larkin that they were in fact sold or delivered to Burton, or to anyone at his instance or request, or that Burton received any benefit from them, or that the credit for the same was given to Burton, or that he in any manner became liable for them, except by reason of the aforesaid stipulation contained in the aforesaid written contract between Burton and Clark. It is claimed, however, that by virtue of this stipulation Burton is liable.

It is unquestionably true that in this state a person, for whose benefit a promise to another, upon a sufficient consideration, is made, may maintain an action on the contract in his own name against the promisor.¹ And this same doctrine is found in many other states.² . . .

But there are limitations upon this rule; or rather, the rule is not so far extended as to give to a third person who is only indirectly and incidentally benefited by the contract a right to sue upon it. In the case of *Simson v. Brown*, 68 N. Y. 355 *et seq.*, the following language is used: "It is not every promise made by one to another from the performance of which a benefit may inure to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit as its object, and he must be the party intended to be benefited."³

¹ *Citing*, *Anthony v. Herman*, 14 Kas. 494; *Harrison v. Simpson*, 17 *id.* 508; *Center v. McQuesten*, 18 *id.* 476; *K. P. Ry. Co. v. Hopkins*, 18 *id.* 494; *Floyd v. Ort*, 20 *id.* 162; *Life Assurance Society v. Welch*, 26 *id.* 641, 642; *Brenner v. Luth*, 28 *id.* 581.

² A part of the opinion, quoting from a note to *Shamp v. Meyer*, 24 Cent. Law Journ. 111, 112, is omitted.

³ In this case, *Simson v. Brown* (1877), 68 N. Y. 355, the facts were as follows:

On March 13, 1869, William Boyd executed and delivered to W. J. Macdonald, a bond and mortgage to secure the payment of \$500. On April 28th, 1869, Macdonald duly assigned and delivered said bond and mortgage to the plaintiff. Subsequently and prior to October 24th, 1871, Boyd without knowledge of such assignment, paid Macdonald the full amount due and unpaid on said bond and mortgage, which payment was made without the knowledge of the plaintiff. On October 24th, 1871, for the purpose of securing to the plaintiff the amount unpaid on this bond and mortgage and to indemnify Boyd against the claim of the plaintiff thereon, W. J. Macdonald and one John Macdonald executed and delivered under seal, their bond to Boyd, in the penal sum of \$1,000, conditioned that if the obligors pay or cause to be paid unto plaintiff the amount of said bond and mortgage and hold the said Boyd harmless therefrom then the bond should be void. Defendant guaranteed the payment of said bond. On June 13, 1873, Boyd, without the knowledge or consent of the plaintiff and without actual consideration, executed under his hand and seal an instrument expressing a consideration and acknowledging full satisfaction of said bond, and consented in said writing that the said bond be canceled. On June 27, 1873, for a valuable considera-

We think this is a correct statement of the law.¹

Of course the name of the person to be benefited by the contract need not be given if he is otherwise sufficiently described or designated. Indeed, he may be one of a class of persons, if the class is sufficiently described or designated. In any case where the person to be benefited is in any manner sufficiently described or designated, he may sue upon the contract.

But the present contract does not come within any of the rules authorizing a third person to sue upon it. It is substantially as follows: Burton agreed with Clark that he (Burton) would furnish to Clark such sums of money as might be necessary for Clark to pay his (Clark's) own future current expenses: not to pay any *existing* debt or obligation; nor, indeed, for *Burton* to pay *any* debt or obligation, present or future, except to Clark; nor for either to pay to any *particular* person or class of persons, except Burton to Clark; nor to pay for any *particular* article, or act, or thing; nor to pay or to do *any other act or thing* for the benefit of any *particular* person or class of persons, except Burton to Clark. Indeed, the contract is solely between Burton and Clark, and solely for the benefit of these two persons, and not for the benefit of any other person or class of persons.

Of course this contract, if everything were to occur as was contemplated, might indirectly result to the benefit of others than Burton or Clark. But so might almost any contract result to the benefit of others than the parties thereto, and yet no cause of action in favor of third persons and against one of the parties to the contract could be founded upon any such indirect results. When the contract in the present case was entered into, no debt or other obligation existed in favor of Larkin and against either Burton or Clark; nor does it appear that it was contemplated by either Burton or Clark that any such debt should be created; or, indeed, that any debt to any person should be created. Probably, at the time when this contract was entered into, Larkin was not thought of; and probably also it was the intention of

tion Boyd duly assigned, transferred, and delivered to the plaintiff the said bond and indorsement of guaranty thereon, and he is now the lawful owner and holder thereof.

As a conclusion of law, the court found that the plaintiff was entitled to recover the amount of the bond and mortgage.

The defendant appealed and the reviewing court reversed the judgment below, holding that the case did not come within the rule that where one, for a valid consideration, makes a promise to another for the benefit of a third, the third person may maintain an action thereon in his own name and for his own use. . . .

"It is not to be denied," said the Court, "that the performance of the condition of the bond to Boyd would have worked consequentially a benefit to Simson, if it had been performed by the payment of the \$500 and interest to him. It might then be said, in a way, to have been a benefit to him in the execution of it. But it is not every promise," etc., as in the text.—*Ed.*

¹ Citing also *Turk v. Ridge*, 41 N. Y. 201; *Garnsey v. Rogers*, 47 *id.* 233; *Merrill v. Green*, 55 *id.* 270; *Vrooman v. Turner*, 69 *id.* 280; *L. O. S. Rld. Co. v. Curtis*, 80 *id.* 219; *Dunning v. Leavitt*, 85 *id.* 30; *Sanders v. Filley*, 29 Mass. 554; *Johnson v. Foster*, 53 Mass. 167; *Greenwood v. Sheldon*, 21 Minn. 254; *Ferris v. Carson Water Co.*, 16 Nev. 44; *Anderson v. Fitzgerald*, 21 Fed. Rep. 294; *National Bank v. Grand Lodge*, 98 U. S. 123

the parties that Burton should furnish the money to Clark, and that Clark should pay his current expenses as fast as he contracts them, and that he should never, under any circumstances, create any debt or debts or other obligation for such expenses to any person.

But, however, this may be, it cannot be said in any aspect of the case that the contract was made for the benefit of Larkin within the meaning of the rule that permits third persons to sue upon contracts. The sums of money to be furnished by Burton to Clark were to be furnished as *loans* to Clark, and not to purchase anything or to pay for anything *for Burton's benefit*, except indirectly as follows: they were furnished to Clark to enable him to carry on Clark's own business, and thereby incidentally to preserve Burton's securities, for the payment of Clark's debts to Burton. As between Burton and Clark, Clark owed Burton many thousands of dollars; and Burton should not be compelled to pay Clark's debts. The debt sued for in the present case is purely Clark's debt.

It is further claimed, by counsel, for Larkin, that "the contract between Burton and Clark really constituted Clark the agent of Burton, and Burton is liable as the principal debtor." We do not think that this claim is tenable at all. All the property, real and personal, belonged to Clark, although the legal title thereto was in Burton, to secure him for the amount which Clark owed him; and Clark had full and complete possession and control of the property; and it was also expressly stipulated in a chattel mortgage given by Clark to Burton at the time when said contract was entered into, that all the personal property should be taken care of by Clark at his own cost and expense; and Clark also resided upon the land, and had a family, for which a portion of his current expenses were incurred; and all the goods, wares, merchandise, and chattels purchased by Clark from Larkin were purchased for Clark, and not for Burton; and the sums of money to be furnished by Burton to Clark were to be furnished as loans to Clark, and not to purchase anything or to pay for anything for Burton's benefit, except as aforesaid.

The judgment of the court below as between Burton and Larkin will be reversed, and the cause remanded for further proceedings.

All the justices concurring.¹

¹ In *Austin v. Seligman*, before the U. S. Circuit Court, S. D., N. Y., in 1883 (18 Fed. Rep. 519), WALLACE, J., delivering the opinion, said: "Unless the plaintiff can recover in *assumpsit* upon the promise made by the defendants to Kempt & Co., to assume all the debts, obligations, and liabilities of the latter, the complaint fails to show a cause of action.

"He was not a party to the contract, nor did its consideration move from him, and there is nothing in its terms to indicate that it was intended to be made for his benefit. The case thus presents the much-vexed question as to the right of a third person to maintain *assumpsit* upon a contract which may inure to his benefit, but to which he is not a party. . . .

"It will not be profitable to attempt to collate the authorities upon the general question. In England it is now distinctly established, so far as any common law right of action is concerned, that a third person can not sue on a contract made by others for his benefit, even if the contracting parties have agreed that he may; (Poll. Cont. 196,) while in both Massachu-

EMMITT v. BROPHY.

SUPREME COURT OF OHIO, JANUARY TERM, 1884.

[42 O. S. 82.]

Error to the District Court of Pike County.

Prior to October, 1866, the "Scioto Bridge Company" became a body corporate, located within Pike County, Ohio, formed for the purpose, among other things, of building and maintaining a toll bridge across the Scioto River in that county. It built the bridge, owned it, and was taking tolls for its use, when, at the October term, 1866, of the common pleas of Pike County, Brophy and Potter, the defendants in error, obtained a judgment against the company for \$483.75 damages, and

sets and New York the later decisions limit more strictly the exceptions to the general rule that the person must sue to whom the promise is made. Neither in these decisions nor elsewhere in this country, has the English rule been recognized. It has the merit of simplicity, but is artificial instead of being reasonable. According to good sense and upon principle there is no reason why a person may not maintain an action upon a contract, although not a party to it, when the parties to the contract intend that he may do so. The formal or immediate parties to a contract are not always the persons who have the most substantial interest in its performance. Sometimes a third person is exclusively interested in its fulfillment. If the parties choose to treat him as the primary party in interest, they recognize him as a privy in fact to the consideration and promise. And the result of the better considered decisions is that a third person may enforce a contract made by others for his benefit, whenever it is manifest from the nature or terms of the agreement that the parties intended to treat him as the person primarily interested. The cases of *Hendrick v. Lindsay* and *National Bank v. Grand Lodge*, and the expressions in the opinions, do not antagonize upon this proposition but accord with it. The language of Folger, J., in *Simson v. Brown*, 68 N. Y. 355, may be adopted as a correct and accurate statement of the law, as follows:

"It is not every promise made by one to another, from the performance of which a benefit may inure to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit as its object, and he must be the party intended to be benefited."

"There is a class of cases where under a contract between two persons, property has come to the hands of one of them, which in equity is charged with a lien or trust in favor of a third person, in which the latter may sue in his own name upon the promise to discharge the lien or assume the trust. These cases have no proper application to a case like the present, where a copartnership transfers its assets to a purchaser, and the only interest of the plaintiff is that of a creditor at large of the selling partners. Such creditors have no lien for their debts upon the partnership assets except in cases of insolvency or administration. Colly. Partn. § 894; Story, Part. §§ 358, 360, *Crippen v. Hudson*, 13 N. Y. 161. If upon such a transfer the purchaser assumes to pay certain specified creditors or certain enumerated debts of the seller, it may be fairly urged that the parties contemplate a direct liability to the specified creditor on the part of the purchaser. On the other hand, when the agreement is silent respecting any specific obligation to be assumed to a third person, the natural inference is that it was intended primarily for the benefit of the promisee, and to adjust the rights and duties of the parties as between themselves.

"Applying this criterion to the case in hand, the plaintiff can not maintain *assumpsit* upon the agreement set forth because there is no recognition of any liability to him, and nothing to indicate that any claim of his was present to the contemplation of the parties. The demurrer is sustained."

"It will serve no useful purpose," said BROWN, P. J., delivering the opinion of the General Term of the Supreme Court of New York in *Wainwright v. Queens County Water Co.* (1894), 78 Hun, 146, 149, "to renew the discussion that has existed upon this rule since the

\$218.50 costs. On this judgment \$55 was paid; and \$98.40 increased costs were made in vain attempts to collect the balance. Brophy and Potter levied execution upon the bridge, and had it appraised and advertised for sale by the sheriff. The bridge could not be sold. No part of the judgment could be made against the company by the ordinary process. Pending the levy Brophy & Potter commenced an action in the same court for the appointment of a receiver to collect the tolls for application upon the judgment.

Pending the latter proceedings, in 1869, the general assembly authorized county commissioners to purchase toll bridges and make them free. By virtue of this enactment, the Scioto Bridge Company sold its bridge to the commissioners of Pike County for the sum of \$18,000, and it was made a free bridge. As an inducement to the commissioners to purchase the bridge and make it free, and as a part of the consideration

decision of *Lawrence v. Fox*, 20 N. Y. 268. Many cases in which that principle has been applied seem to be in conflict with the rule that in an action upon a contract, privity of contract must exist between the parties. But when the third party was specifically named in the contract, or the promisor received money or property which he agreed to pay over to the third party, who, by adopting the contract became a beneficiary thereunder, or where the promisee was under a legal obligation to the third person, which the promisor assumed as his own and thus connected himself with the transaction, privity of contract by adoption was spelled out.

"But it is now settled that to bring a case within the rule, the contract must not only be beneficial to the third party, but it must have been intended for his benefit by the contracting parties. *Etna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; *Garnsey v. Rogers*, 47 N. Y. 233; *Vrooman v. Turner*, 69 N. Y. 280, (given in the text, *infra*).

"In many cases where, as in the one before the court, the performance of the agreement would be beneficial to third persons, recoveries have been denied because the agreement was not specially intended for the benefit of those suing thereon. *Turk v. Ridge*, 41 N. Y. 207; *Merrill v. Green*, 55 N. Y. 270; *Simson v. Brown*, 68 N. Y. 355. This case can not, therefore, I think, be brought within the rule applicable to promises made for the benefit of third parties."

In the case noted, *Wainwright v. Queens County Water Co.*, the complaint alleged that the agreement upon which the plaintiff sued [an agreement upon the part of the defendant Water Company with a "fire district"] "had been entered into with the defendant . . . for the benefit of the residents and tax-payers within said fire district and for the benefit of these plaintiffs." And on the demurrer the plaintiffs claimed that this allegation was one of fact, and therefore admitted by the demurrer. But said the Court, "the substance of the resolution of the board of supervisors and the agreement entered between the parties is set forth in the second and third paragraphs of the complaint. No individual tax-payer is named in the agreement, nor is it therein stated to be for their benefit. Nor did the defendant agree to extinguish fires; and it is clear, I think, that the allegation is a conclusion solely from the fact that its performance by the defendant would inure to the benefit of the plaintiff and other tax-payers of the district. This is not sufficient to bring the case within the rule that when a promise is made by one person for the benefit of another, it may be enforced at the suit of the latter."—*PER BROWN, P. J.*, p. 149.

A judgment overruling the demurrer was therefore reversed and the demurrer sustained. So, also, *Buckley v. Gray* (1895), 110 Cal. 339: "It is claimed, however, that the action can be maintained under the rule expressed in § 1559 of our Civil Code, that a contract made by one person for the benefit of a third may be enforced by the latter. . . . But in our judgment that provision has no application to this case. It is intended to apply to instances where the contract is made expressly for the benefit of the third person, not where the third person is or may be merely incidentally or remotely benefited as the result of such contract. Such is the language of the code, and such will be found to be the application of the doctrine in all the cases cited by counsel, or which have come to our attention."—*PER VAN FLEET, J.* (p. 346).

Accord also: *Welden National Bank v. Smith* (1898), 86 Fed. Rep. 398, 402.

of the purchase, the plaintiff in error, James Emmitt, who owned a controlling interest in the bridge company and received the entire sum of \$18,000, was required by the commissioners and did give his bond to the state of Ohio, as nominal obligee, "for the use and benefit of Pike County," in the sum of \$5,000.

"The county commissioners of the said county of Pike, have this day purchased the Scioto bridge of the owners thereof, and the above bound James Emmitt, being the principal stockholder and chief owner of said bridge, for his own behalf, and to induce the said commissioners to make said purchase, and as part and parcel of the terms of said purchase, has agreed with the said commissioners, to the performance of which he hereby binds himself, . . . to pay off and liquidate *all claims and demands, liens and debts, whether in judgment or otherwise, existing against said bridge*, so that the full use of said bridge may inure to the public without let or hindrance. And as a further inducement to said commissioners to make such purchase, the said Emmitt binds himself, to guaranty, and does hereby guaranty to the said Pike County the full, free, undisturbed, and peaceable use of the said Scioto Bridge, together with all its privileges, appurtenances, fixtures, franchises, and approaches.

"And whereas, the said county commissioners, on behalf and for the use of said Pike County, do pay in hand to the owners of said bridge the full amount of the purchase price thereof, the said Emmitt, in consideration thereof and of all the premises, binds himself to the faithful performance of all the conditions foregoing, within a reasonable time from the date hereof; and upon the failure of the said Emmitt to perform any of said conditions, said bond becomes forfeit and may be immediately enforced; and upon a faithful performance of all of said conditions said obligation becomes void."

This bond was executed and delivered November 8, 1870.

Emmitt and the commissioners had full knowledge of the judgment, the levy, and all the proceedings thereunder of Brophy & Potter at the time this bond was made and delivered.

At the February term, 1880, of the court of common pleas, the judgment of Brophy & Potter, being wholly unsatisfied except as to the \$55 paid upon it, was caused by them to be revived. On April 10, 1880, Brophy & Potter filed their petition in the court below, setting forth the foregoing facts, that the judgment was still wholly unpaid, except the \$55, and prayed judgment against Emmitt for the unpaid balance of their judgment against the bridge company, their costs, and the interest thereon. Emmitt's demurrer to this petition was overruled, and he excepted. He then answered, setting up seven different grounds of defence, all of which were demurred to by the plaintiffs. The demurrers were sustained, and he excepted. He then interposed, as an eighth defence, that the plaintiffs had, prior to their action, transferred their judgment to one Alfred Yapple, upon which issue was joined and found, on trial, to be with the plaintiffs. The court rendered judgment against Emmitt for the unpaid balance of the judgment, including original and increased costs and interest on the judgment and original costs.

The overruling of the demurrer to the petition, the sustaining of the demurrer to the first seven defences, the rendition of judgment, and awarding interest on the costs, are severally assigned for error. The district court affirm the judgment below, and to reverse these judgments the present proceeding is prosecuted.

John T. Moore & Son, for plaintiff in error.

Alfred Yapple and John W. Washburne, for defendant in error.¹

OWEN, J.—It would be unprofitable to discuss in detail the several supposed defences below, for they nearly all assume the vital, central fact that Brophy and Potter had a valid claim against the bridge company, and a valid lien upon the bridge at the time of its purchase by the commissioners. These supposed defences mostly proceed upon the assumption that whatever liability Emmitt assumed by his bond was collateral to that of the bridge company, and aver that the plaintiffs had failed to invoke or pursue other remedies and securities within their reach. If Emmitt by his bond became principally and primarily liable to Brophy and Potter, they had their election of remedies and this is decisive against him of each ground of defence. In other words, if the facts alleged in the petition constitute a cause of action against him, they are not avoided by anything alleged in the answer. From the facts apparent upon the record, including the recitals of Emmitt's bond, we are at liberty to infer that he was, practically, the bridge company; that the other stockholders were such simply to vitalize the corporation, their interest in which was but nominal.

In his first defence, Emmitt avers that :

"In the month of May, A. D. 1868, an act of the general assembly of the state of Ohio was duly passed, became a law, went into immediate effect and continued in force until the year A. D. 1880; which act authorized the said plaintiffs and empowered them to levy upon and sell said bridge on execution issued upon the judgment recited in their petition in this case, and by virtue of said act said plaintiffs did cause execution to be issued upon said judgment and levied the same upon said bridge, which levy was subsisting and in full force at the time said bridge company sold and transferred said bridge to the commissioners of Pike County, who purchased the same regardless of said levy, and immediately caused said bridge to be used by the traveling public without payment of tolls, and caused the same to be and remain thenceforth in every respect a free bridge."

This averment is abundantly justified by the act referred to (65 O. L. 136). The plaintiffs had, by their levy, acquired a *lien upon the bridge*. By the express conditions of the bond, Emmitt agreed to "pay off and liquidate all claims and demands, *liens*, and debts, whether in judgment or otherwise, *existing against said bridge*."

These facts are strongly suggestive that it entered into the contemplation of the parties to this bond at the time of its execution, that this particular lien of the plaintiffs upon the bridge was to be dis-

¹ The arguments are omitted.

charged by Emmitt. Its existence was known to them, and they seem to have left nothing to conjecture. Indeed, if Brophy and Potter had been expressly named as the lien-holders, it is difficult to see how this would have added to the definiteness of the bond, or made more certain the intention of the parties. This seems to be a conclusive answer to the suggestion that there is a want of privity between the immediate parties to the bond and the plaintiffs, which is chiefly relied upon by Emmitt as a defence. It is settled in this state that an agreement made on a valid consideration by one person with another, to pay money to a third, can be enforced by the latter in his own name.¹

Nor need he be named especially as the person to whom the money is to be paid. *Coster v. Mayor*, 43 N. Y. 411.

And the law regards that as certain which points to the sources of authentication or identification; a principle which applies with special force to this bond.

The proposition that the rule invoked against Emmitt, is confined in its operation to simple and unsealed contracts, is not well founded.²

The plea of the statute of limitations is equally untenable. The action was properly prosecuted upon the written instrument which evidenced Emmitt's liability.

In his "fifth defence," Emmitt avers that long prior to the filing of the plaintiff's petition herein, he contended that he was not bound to pay the judgment, utterly refused to pay it, and "rescinded said alleged promise." A rescission of the contract sued upon by the parties to it, prior to the plaintiffs assenting to it, would have been a good defence.³ But the rescission contemplated by this principle is one by the parties, whereas the averment of Emmitt is that he refused to pay the judgment and *he* rescinded the promise. It was not in his power to do this. The term "rescinded," as he employs it, is convertible with "repudiated." It was as easy for him to repudiate, as singly to rescind his promise.

The plaintiff's election to proceed upon the bond is denied. Their action was such election. What effect this election may have had upon their claim against the bridge company, or against the bridge, is not before us for determination.

The defendant further relies upon the failure of the plaintiffs to assert their rights within a reasonable time, and allowing nine years to elapse before filing their petition. The duty of the plaintiffs to sue was no more urgent than that of Emmitt to pay. Wherein he was more prejudiced by their withholding their action than they were by his withholding their money is not apparent. There having been no change in

¹ *Citing* *Crumbaugh v. Kugler*, 3 Ohio St. 549; *Bagaley v. Waters*, 7 Ohio St. 367; *Trimble v. Strother*, 25 Ohio St. 381; *Thompson v. Thompson*, 4 Ohio St. 333.

² *Citing* *Coster v. Mayor*, 43 N. Y. 411; *McDowell v. Leav*, 35 Wis. 171; *Rogers v. Gosnell*, 51 Mo. 466.

³ *Citing* *Trimble v. Strother*, 25 Ohio St. 378; *Brewer v. Mauer*, 38 Ohio St. 554; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650.

the status either of the parties or the contract, the statute of limitations furnished the only legal test of promptness in asserting their rights under the bond. In the action of the court upon the demurrers there was no error.¹

*Judgment affirmed.*²

CONSTABLE v. NATIONAL STEAMSHIP COMPANY.

SUPREME COURT OF THE UNITED STATES, MAY 26, 1894.

[154 U. S. 51.]

This was a libel in admiralty by the firm of Arnold, Constable & Co. against the National Steamship Company, owner of the British steamship *Egypt*, to recover the value of thirty-six cases of merchandise carried by this steamer from Liverpool to New York, delivered on the pier of the Inman Steamship Company on January 31, 1883, and upon the same night destroyed by fire through the alleged negligence of the respondent. The answer admitted most of the material allegations of the libel, but denied all charges of negligence, and also of liability for the loss of the merchandise.

Upon a hearing on pleadings and proof in the District Court, the libel was dismissed (29 Fed. Rep. 184), and upon appeal to the Circuit Court the decree was affirmed.

Libellants thereupon appealed to this court. . . .³

Mr. Joseph H. Choate, for appellants. *Mr. William V. Rowe* and *Mr. Treadwell Cleveland* were with him on his brief.

¹ Only so much of the opinion is given as relates to the one point.

² The deed to a tract of land purchased of one Moore by a syndicate was made to a third person, who gave his notes, secured by a deed of trust, for the balance of the purchase money, but under an agreement in a declaration of trust between himself and the members of the syndicate that they would be individually responsible each to a certain extent for the payment of these notes. The owner of the notes knew nothing of this agreement when he took the notes. Afterwards he brought suit in his own name upon that agreement against a member of the syndicate. Said the Court: "In order that the holder may maintain the action it must appear that the promise by the defendant to pay one-fifth of the balance of the purchase money was made for the benefit of the person entitled thereto. Neither Moore nor Mrs. Parker [to whom Moore assigned the notes] knew anything of the existence of the declaration of trust before the assignment of the notes to her, but this makes no difference if the contract was made for the benefit of the person entitled to the purchase money. . . . Defendant not only knew from other sources that the property was purchased from Moore for the syndicate, the amount to be paid therefor, the amount of cash payment, and how and when the deferred payments were to be made, but all these facts substantially appear from the recitals in the declaration of trust, and sufficiently show that he was really the only person intended to be or that could in fact be benefited by the clause therein contained by which defendant agreed and bound himself to contribute and pay when due one-fifth of the unpaid money for said property, and bring Moore, or the assignee of the notes, within the rule which permits a person for whose benefit an express promise is made in a valid contract between others to maintain an action upon it in his own name." —*Per BURGES, J.*, in *Porter v. Woods* (1897), 138 Mo. 539, 553-4.—*Ed.*

³ Part of the statement of facts is omitted.

Mr. James C. Carter, for appellee. A brief for the same was also filed by *Mr. John Chetwood*.

MR. JUSTICE BROWN delivered the opinion of the court.

This case involves the liability of a steamship company for the loss by fire of a consignment of goods unloaded without personal notice to the consignees upon the wharf of a company other than the one owning the vessel. . . .¹

Upon the facts of this case exhibiting a necessity for a discharge elsewhere than at her own pier, and in the absence of any evidence that the libellants were prejudiced by the failure of the *Egypt* to discharge at her usual wharf, we think there was no breach of duty on the part of the respondent in this particular.

Another serious question, however, is presented by the proviso in the application to allow the unpermitted cargo to remain upon the wharf, viz., that it should remain

"at the sole risk of owners of said steamer, who will pay the consignee or owner the value of such cargo respectively as may be stolen, burned, or otherwise lost, and who will also pay all duties on cargo which may be in any way lost by so remaining."

It seems that, upon the arrival of a transatlantic steamer, it is usual to apply for and obtain a general order to allow to be landed and sent to the public store (not the warehouse on the wharf) all packages for which no special permit or order shall have been received; also, a permit to allow such portion of the cargo as is unladen, but not permitted, to remain upon the wharf for forty-eight hours from the time of the granting of the above general order, at the expiration of which time they are sent to the proper general order store; and also a special license to permit the cargo to be unladen at night. These orders, licenses, and permits are granted in pursuance of the general regulations of the Treasury Department.

Granting that the request made by the company is, upon its face, broad enough to impose upon the company the responsibility for goods lost by fire, it must be construed in connection with the following stipulation upon the same subject in the bill of lading, viz.:

"The goods to be taken from alongside by the consignee immediately the vessel is ready to discharge. . . . The collector of the port being hereby authorized to grant a general order for discharge immediately after entry of the ship. The United States Treasury having given permission for goods to remain forty-eight hours on wharf at New York, any goods so left by consignee will be at his or their risk of fire, loss, or injury."

Some criticism is made upon the words "so left by consignee," libellants insisting that the word "left" implies a voluntary leaving of the cargo upon the wharf after notice of the discharge of the same has been

¹ Part of the opinion, reviewing the evidence, is omitted.

received by the consignee. We are not inclined, however, to affix to it such a technical meaning. In view of the fact that the object of the stipulation was evidently to exempt the carrier from responsibility for fire occurring at any time after the discharge of the cargo, and particularly during the forty-eight hours they were permitted to remain upon the wharf, which forty-eight hours, under the terms of the permit, began to run from the time of the general order to unload was granted, we think it clear that it was intended to apply during this time, whether the goods were technically "left" by the consignee or not, and that the proviso should be interpreted as if it read: "The United States Treasury having given permission for goods to remain forty-eight hours on wharf at New York, any goods so remaining will be at consignee's risk of fire, loss, or injury." This permission, though granted at the request of the ship-owner and primarily for his benefit, is really of more value to the consignees, since a convenient opportunity is there afforded them to examine their goods, and they are saved the expense of cartage to a bonded warehouse and storage therein.

The question presented then is substantially this: A and B agree that in a certain contingency A shall assume the risk of the loss of his goods by fire. Subsequently B agrees with C that, in precisely the same contingency, he shall be responsible to A for the loss of the same goods. Waiving the question whether this means any more than that he shall be responsible so far as C is concerned, does the latter contract supersede the earlier? Unquestionably it would, if it were between the same parties. In this case, however, the first contract was made by B (the respondent) in full contemplation of the fact that it would be obliged to enter into the second, and for the special purpose of providing against it. Now, to say that, having entered into the first contract, knowing that it would have to enter into a second one wholly inconsistent with the first and intending to be bound by it, is scarcely creditable to the intelligence of its agent. Libellants, too, though parties, or rather privies to the first contract, were not parties to the second, and so far as it appears did not even know that it was or would be entered into, except as they may have known a general usage to protect officers in this manner. The position of the parties had not changed in the interval; no new consideration moved from the libellants; and while the contract was nominally made for their benefit, this gift of the collector was purely a voluntary one. Indeed, the contract seems really to have been for the protection of the collector himself. Under these circumstances it is clearly the duty of this court to harmonize these contracts, if it be possible to do so.

It is by no means a universal rule that a person may sue on a contract made for his benefit, to which he was not a party.¹ No case has gone so

¹ *Citing*, *Hendrick v. Lindsay*, 93 U. S. 143; *National Bank v. Grand Lodge*, 98 U. S. 123; *Keller v. Ashford*, 133 U. S. 610; *Cragin v. Lovell*, 109 U. S. 194; *Willard v. Wood*, 135 U. S. 309.

faras to hold that, where the person for whose benefit the contract is made, has himself or by his privy in estate entered into a contract inconsistent with this, he may repudiate such prior contract, and claim the benefit of the second simply because it has become for his interest to do so. We know of no principle which authorizes one party to an agreement to vary it, even against his own interest, without the consent of the other. As observed by the Court of Appeals of New York, in *Simson v. Brown*, 68 N. Y. 355: "It is not every promise made by one to another, from the performance of which a benefit may inure to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit *as its object* and he must be the party intended to be benefited." See also *National Bank v. Grand Lodge*, 98 U. S. 123; *Garnsey v. Rogers*, 47 N. Y. 233.

The principle above announced was still further limited by the Court of Appeals in *Vrooman v. Turner*, 69 N. Y. 280,¹ in which it was said that, to give a third party, who may derive a benefit from the performance of a promise an action, there must be—*first*, an intent by the promisor to secure some benefit to the third party; and, *second*, some privy between the two, the promisor and the party to be benefited, and some obligation or duty owing from the promisor to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent to him personally.

It is necessary to a correct understanding of this contract to examine somewhat in detail the circumstances under which it was entered into, and the authority under which the collector acted in prescribing its terms. By Revised Statutes, sections 2867 and 2869, general authority is given to the collector to authorize the unloading of vessels arriving within the limits of their collection districts, and to grant a permit to land the merchandise. By section 2966 the collector is authorized to take possession of such merchandise, and deposit the same in bonded warehouses, and by section 2969 all merchandise of which the collector shall take possession under these provisions shall be kept with due and reasonable care at the charge and risk of the owner. By section 2871 the collector, "upon or after the issuing of a general order," (for the unloading of the cargo) "shall grant, upon proper application therefor, a special license to unlade the cargo of said vessel at night, that is to say, between sunset and sunrise," upon a bond of indemnity being given, etc., "and any liability of the master or owner of any such steamship to the owner or consignee of any merchandise landed from her shall not be affected by the granting of such special license or of any general order, but such liability shall continue until the merchandise is properly removed from the dock whereon the same may be landed."

¹ Given in text, *infra*.

There is certainly nothing here which contemplates that the owner of the vessel shall enter into any independent obligation, assuming new liabilities or expanding in any way existing liabilities, to the consignee. The object of the statute is clearly to preserve the *statu quo*; to continue such liability as already exists and to preclude the ship owner from claiming that, by the action of the collector, his liability to the owner of the merchandise is impaired or restricted. In the language of the statute, any previous liability "shall not be affected", "but such liability shall continue until the merchandise is properly removed from the dock whereon the same may be landed."

It is true that no mention is here made of the power of the collector to allow the unpermitted cargo to remain forty-eight hours upon the wharf, and no such power is expressly given; but by section 2989 "the Secretary of the Treasury may from time to time establish such rules and regulations, *not inconsistent with law*, for the due execution of the provisions of this chapter, and to secure a just accountability under the same as he may deem to be expedient and necessary." While there is nothing in the statute allowing any fixed time to elapse between the unloading of the goods and their removal to a bonded warehouse, the statute does not prohibit such time being allowed, and as some interval must necessarily elapse for the examination and appraisement of the goods designed for immediate delivery to the importer—duties which can most readily be performed while the goods are yet on the wharf—and as it is for the mutual benefit of the government and consignee to allow some such interval of time to elapse, the Secretary of the Treasury is doubtless vested with a certain discretion in that particular, under the power given him by section 2989, and also by section 251, which authorizes him to make rules and regulations not inconsistent with law in carrying out the provisions of law relating to raising revenue from imports.

In pursuance of this authority the Secretary of the Treasury, on May 5, 1877, adopted certain regulations concerning the discharge of steamships, of which the following only is material:

"Goods will be delivered from the docks by the inspector as fast as permits therefor are presented, and such as are discharged for which no delivery permit has been received will be sent to the general order store. The collector may, at the request of the master, agent, or owner of the vessel, allow goods landed but not 'permitted' to remain on the docks at the sole risk of the owner of the vessel, not longer than forty-eight hours from the time of their discharge, upon the production of evidence that the owner of the vessel assumes the risk of the goods allowed to remain and agrees to pay the duties on any goods which may be lost by so remaining. This request must be made in writing to the collector, and must state that if the permission is granted the goods will be at the risk of the owner of the vessel; that he will pay all duties on the goods that may be lost, and must be signed by the owner of the vessel or his agent duly authorized. The consent of the collector thereto must also be granted in writing. At

the expiration of the forty-eight hours, no permit having been received for their delivery by the inspector, the collector shall send the goods to the general order store to have the same weighed or guaged, if required."

In this connection it must be borne in mind that the Secretary of the Treasury is an officer of the Government; that his powers are limited by law; that his duty is to protect the revenues of the government and to prevent smuggling or other illegal practices, whereby the government may be defrauded of its revenue; and that he owes no duty to individuals beyond seeing that their rights are not prejudiced any further than is necessary by the action of the customs officers. He is neither the agent of the vessel nor of the importer, but stands between them, representing only the government and charged only with the collection of its revenue. The above regulation when carefully examined, is consistent with this view. It requires the collector to allow the goods to remain upon the docks "at the sole risk of the owner of the vessel," and requires the latter to assume "the risk of the goods allowed to remain," and to agree "to pay the duty on any goods which may be lost by so remaining." It is obvious from the context that the risk referred to is the risk as between the owner of the vessel and the government, viz., the risk of paying duties upon such goods as may be lost during the forty-eight hours. The permit is granted primarily for the benefit and at the request of the vessel, which retains its lien for freight for the goods so long as they remain upon the dock. The government has as yet no claim for duties against the consignee of the goods, and it is just that the owner of the vessel should assume the liability for duties. There is nothing here indicating an intention of imposing any liability upon the shipowner for the goods themselves, except so far as to protect the government from loss. The loss referred to is probably a loss by theft, to which these warehouses are peculiarly subject, since, if the goods were destroyed by fire, the consignee would, under section 2984, be entitled to an abatement or refund of duties. This construction of the shipowner's obligation is rather emphasized than otherwise by the subsequent clause of the regulation: "This request must be made in writing to the collector, and must state that if the permission is granted the goods will be at the risk of the owner of the vessel; that he will pay all duties on goods which may be lost," etc. The risk he thus assumes is the risk of paying duties on goods which may be lost. There is nothing in these instructions, interpreted in the light of the statute and of the powers of the collector, to justify the inference that it was intended to impose any new or different obligations upon the owner of the vessel, with respect to the consignees of the merchandise.

In the forms prescribed, probably by the department, to carry out these regulations, however, there is an apparent departure both from the language of the statute and the Treasury regulations in the obligation the owner of the vessel is required to assume,—

"to pay to the consignee or owner the value of such cargo respectively as may be stolen, *burned*, or otherwise lost, and also pay all duties on cargo which may be in any way lost by so remaining."

Here the obligation to indemnify the consignee first appears and occupies the most prominent place, and is extended to goods stolen, burned, or otherwise lost, while the obligation to pay duties is mentioned rather incidentally than otherwise. Wherever, or by whomsoever these forms were prepared, we must, for the purposes of this case, treat them as the act of the collector, who, if this contract be construed as intended for the protection of any one but the collector himself, clearly exceeded his authority in requiring the owner of the vessel to assume, as against the consignee, the risk of their being burned while upon the wharf. As the Circuit Court finds that "such application was in the form required by said collector, without which permit would not be granted, and the entire cargo would be sent to the public store," it can not be treated as the voluntary act of the shipowner any further than this contract or obligation conformed to the requirements of the statute or the Treasury regulations, which were designed, as we have already stated, only to preserve the previous rights of the consignee against the owner of the steamship unimpaired by the action of the collector. Beyond this it must be treated either as obtained by duress, or so plainly inconsistent with the previous agreement of the parties *inter sese* as to be of no avail to the consignee.

It is a familiar doctrine in this court that a bond or other obligation extorted by a public officer, under color of his office, can not be enforced, and the remarks of this court in the case of *United States v. Tingey*, 5 Pet. 115, 129, are pertinent in this connection. In this case the Navy Department caused a form of bond, not prescribed by law, to be prepared and transmitted to one Deblois, a person to whom the disbursement of public moneys was intrusted as purser, to secure fidelity in his official duties, with a condition that it should be executed by him with sufficient sureties before he should be permitted to remain in office, or to receive the pay or emoluments attached to the office. "The substance of this plea," said the court, "is that the bond, with the above condition, variant from that prescribed by law, was, under color of office, extorted from Deblois and his sureties, contrary to the statute, by the then Secretary of the Navy, as the condition of his remaining in the office of purser and receiving its emoluments. There is no pretence then to say, that it was a bond voluntarily given, or that, though different from the form prescribed by statute, it was received and executed without objection. It was demanded of the party, upon the peril of losing his office; it was extorted under color of office, against the requisitions of the statute. It was plainly then an illegal bond; for no officer of the government has a right, by color of his office, to require from any subordinate officer, as a condition of holding office, that he should execute a bond with a condition different from that pre-

scribed by law. That would be, not to execute, but to supersede the requisitions of law."

A distinction is drawn in this class of cases between a bond compulsorily executed, as in the case under consideration, and a bond or other obligation voluntarily given to the government for which there is no statutory authority. In this latter case the bond has been held to be valid. *United States v. Bradley*, 10 Pet. 343, 358; *United States v. Hudson*, 10 Wall. 395.

Upon the whole case we are of opinion :

1. That the stipulation in the bill of lading that respondent should not be liable for fire happening after unloading the cargo was reasonable and valid.
2. That the discharge of the cargo at the Inman pier was not in the eyes of the law a deviation such as to render the carrier an insurer of the goods so unladen.
3. That if any notice of such unloading was required at all, the bulletin posted in the custom-house was sufficient under the practice and usages of the port of New York.
4. That libellants, having taken no steps upon the faith of the cargo being unladen at respondent's pier, were not prejudiced by the change.
5. That the agreement of the respondent with the collector of customs to pay the consignees the value of the goods was not one of which the libellants could avail themselves as adding to the obligations of their contract with respondent.

The decree of the Circuit Court is therefore

Affirmed.

MR. JUSTICE JACKSON, with whom concurred MR. JUSTICE FIELD and MR. JUSTICE GRAY, dissenting.¹

¹ In his dissenting opinion, MR. JUSTICE JACKSON remarked, *inter alia*, as follows:

"In the light of these findings [by the Circuit Court], the contract of the parties should be interpreted as though the clause in question had read as follows: 'The United States Treasury having given permission for goods to remain forty-eight hours on the wharf at New York, at the sole risk of the steamship company, and upon its undertaking to pay to the consignee or owner the value of such cargo respectively as may be stolen, burned, or otherwise lost while so remaining, now it is understood that if the steamship company avails itself of this regulation, and obtains permission for the consignment to remain on the wharf for forty-eight hours upon said terms, its risk and liability for losses shall only continue and remain in force until the consignee has had due notice and opportunity to remove or take charge of the goods; and if, thereafter, they are left by the consignee, it will be at his risk of fire, loss, or injury.' This harmonizes all the clauses, and is alone consistent with the correlative duties and obligations of the parties.

"It is not material to the present case to determine whether the regulations of the Treasury Department, set out in the eleventh finding of the court below, have the force of law, and imposed upon the steamship company the duty of entering into the stipulation to pay the consignees for the loss of the goods deposited on the wharf under the forty-eight hour permit. That stipulation was entered into voluntarily by the steamship company. There was no requirement in the contract of affreightment that it should obtain any such permit, and it can not be properly said that the stipulation which it entered into in order to secure permission for the goods to remain forty-eight hours on the wharf, was inconsistent with any provision of the law or regulations of the Treasury Department. No provision of the bill of lading exempted the carrier from liability for loss by fire that might happen while the goods were deposited on the wharf under the forty-eight hour permit, and no reason appears why the carrier might not expressly undertake a liability which the law would

THE CINCINNATI, HAMILTON & DAYTON RAILROAD
COMPANY v. METROPOLITAN BANK.

SUPREME COURT OF OHIO, JANUARY 21, 1896.

[54 O. S. 60.]

Error to the Superior Court of Cincinnati.

The action below was by the plaintiff in error against the defendant in error to recover on a bank check. The petition was in words and figures following :

"The plaintiff is a corporation duly organized and existing under the laws of the state of Ohio. The defendant is a corporation duly organized and existing under the laws of the United States.

"There is due to the plaintiff from the defendant, upon a check, a copy of which, there being no credits nor endorsements thereon, is hereto attached, made part hereof, and marked 'Exhibit A,' the sum of three hundred and thirty-eight 31-100 dollars (\$338.31), with interest from May 11, 1886. The plaintiff is the owner and holder of said check, and on May 11, 1886, presented it for payment to the defendant, who at that time, and at the time of the drawing of said check, had funds of said J. E. Ash on deposit, more than sufficient to pay the same, but the defendant refused to pay said check.

otherwise impose upon it, until by proper notice the duty of taking care of the goods was shifted or transferred to the consignees.

"But, it is said, the consignees can not avail themselves of this promise made by the steamship company to the collector because they are not privies thereto. This, however, ignores the above findings of fact by the court, which make the consignees parties to the arrangement. Aside from this, while it is undoubtedly the general rule that a person who is not a party to a simple contract, can not enforce such contract at law, and that a promise made by one person to another for benefit of a third, who is a stranger to the consideration, will not support an action by the latter, *National Bank v. Grand Lodge*, 98 U. S. 123, there are many exceptions to the rule, one of which, according to the New York decisions, is where the party seeking to enforce the contract was intended to be the beneficiary of the promise. *Lawrence v. Fox*, 20 N. Y. 268; *Coster v. Albany*, 43 N. Y. 399, 410, 412; *Garnsey v. Rogers*, 47 N. Y. 233; *Vrooman v. Turner*, 69 N. Y. 280, [given in text, *infra*].

"The promise made by the steamship company in the present case falls directly within the rule announced in *Vrooman v. Turner*, 69 N. Y. 280, there being, *first*, a clear intent by the promisor to secure a benefit to the consignees; *second*, a privity between the two in respect to the protection of the goods, the risk of which the carrier assumed; and, *third*, an obligation or duty owing by the steamship company to the consignees to properly care for the goods until delivery could be made, which gave to the consignees a legal and equitable claim to the benefit of the promise. The decisions in other states are conflicting on this question.

"But if an action at law would not lie upon the promise made by the respondent in obtaining the forty-eight hour permit, it by no means follows that the consignee could not successfully invoke the aid of a court of equity in enforcing the agreement. The legal rule invoked is not so rigidly or so strictly adhered to by courts of equity as by courts of law. Thus, in *Keller v. Ashford*, 133 U. S. 610, 625, the mortgagee was permitted to enforce in equity a contract between the mortgagor and his grantee, by the terms of which the grantee assumed the payment of the mortgaged debt. See also *Willard v. Wood*, 135 U. S. 309, 314; *Norwood v. DeHart*, 3 Stewart, (30 N. J. Eq.) 412. . ."

MR. JUSTICE FIELD and MR. JUSTICE GRAY concurred in this dissenting opinion.

"Wherefore the plaintiff prays judgment against the defendant for said sum of \$338.31, with interest from May 11, 1886, for its costs, and all other relief to which it may be entitled.

"EXHIBIT 'A.'"

"Cincinnati, May 10, 1886.

"*Metropolitan National Bank:*

"Pay to the order of the C. H. & D. R. R. Co., three hundred and thirty-eight 31-100 dollars.

"\$338.31.

(Signed)

J. E. ASH."

A general demurrer was interposed by the bank, and the holding of the superior court at general term was, in effect, to sustain the demurrer. Judgment for the bank followed, to reverse which the present proceeding is prosecuted.

Ramsey, Maxwell & Ramsey, for plaintiff in error.

Pogue, Pottenger & Pogue, for defendant in error.¹

SPEAR, J.—The question presented is whether or not a payee of a bank check can maintain an action against a bank, where the latter, on presentation, refuses to pay it, the drawer having at the time a credit on the books of the bank more than sufficient to meet the check?

Questions bearing some relation to this have been considered by this court, but the precise question has not heretofore been determined.

Authority is found supporting the affirmative of this proposition. The grounds urged are not identical in all cases, nor is the reasoning wholly consistent, but the following is believed to be a fair resume of the conclusions: Because of the universal usage of banks to cash the checks drawn by a depositor, where he has sufficient unincumbered balance standing to his credit, a duty is implied on the part of the bank to so pay, and the holder takes the check relying upon this usage. Serious injury may result to the holder by the bank's refusal to pay, for, while he may have an action against the drawer, that would prove delusive in the frequent instance of the drawer's insolvency, and the bank's wrongful action would be the real cause of the loss. The law, therefore, implies a contract on the part of the bank with its depositors to pay their checks as presented so long as the fund is sufficient, and should, for like reasons, imply a contract with whomever may become the holder of such check to pay on presentation. The check is treated as an equitable assignment *pro tanto* of the fund in the hands of the bank, and, by the act of presentation, the check-holder is brought into privity with the bank, his right to sue completed, and he may sue the drawer and the bank in one action, the former as drawer and the latter as an implied acceptor. He may also sue the drawer on the check's dishonor, or the bank for money had and received.

Forceful and ingenious arguments in support of the right to maintain the action are presented by Mr. Morse, in his valuable work on Banking, by Mr. Daniels in his treatise on Negotiable Instruments, vol. 2,

¹ The arguments are omitted.

section 1638, where the arguments *pro* and *con* are stated and ably reviewed, and by a number of decisions.¹

The contrary doctrine is maintained by many text writers and decisions.²

It is not doubted that, as a general proposition, there can be no cause of action upon a contract unless there is privity of contract between the obligor and the party complaining. But it is urged in argument here that while the want of privity is a good objection to the action in those states which deny the right of a third party for whose benefit a contract is made to maintain an action upon it, in Ohio the objection of want of privity can not prevail for the reason, as held by this court in a number of cases, that an agreement made on a valid consideration by one person with another, to pay money to a third, can be enforced by the latter in his own name, and that the third person is not named does not affect the right to enforce it.

The most recent case involving this principle is that of *Emmitt v. Brophy*, 42 Ohio St. 82. The action was upon a bond given by Emmitt to the county commissioners in the sale of a bridge by the Scioto Bridge Co., in which Emmitt obligated himself "to pay off and liquidate all claims and demands, whether in judgment or otherwise, existing against said bridge, so that the full use of said bridge may inure to the public without let or hindrance." Brophy at the time was a judgment creditor and the owner of all the claims enumerated in the bond. Owen, J., in the opinion, after reciting the facts, observes: "These facts are strongly suggestive that it entered into the contemplation of the parties to this bond at the time of its execution, that this particular lien of the plaintiff upon the bridge was to be discharged by Emmitt. Its existence was known to them, and they seem to have left nothing to conjecture. Indeed, if Brophy and Potter had been expressly named as the lien-holders, it is difficult to see how this would have added to the definiteness of the bond, or made more certain the intention of the parties. This seems to be a conclusive answer to the suggestion that there is want of privity."

¹ Some of these decisions, as cited by the court, are *Munn v. Burch*, 25 Ill. 35; *Insurance Co. v. Stanford*, 28 Ill. 168; *Bank v. Bank*, 80 Ill. 212 (but see opinion in *Bank v. Bank*, 7 Bissell, U. S. 195); *Roberts v. Corbin*, 26 Iowa, 315; *Lester v. Given*, 8 Bush, 353; *Fogarties v. Bank*, 12 S. C. 518; *Gordon v. Muchler*, 34 La. Ann. 608; *Fonner v. Smith*, 31 Neb. 107.

² The court cited the following as some of the authorities on this point: *Randolph on Commercial Paper*, vol. 2, p. 290; *Pomeroy's Equity Jurisprudence*, section 1284; *Van Schaack on Bank Checks*, 212; *Bank v. Millard*, 10 Wallace, 152; *Bank v. Whitman*, 94 U. S. 33; *Bank v. Schuler*, 120 U. S. 514; *Mining Co. v. Brown*, 124 U. S. 391; *Bank v. Bank*, 46 N. Y. 82; *Attorney General v. Insurance Co.*, 71 N. Y. 325; *Bullard v. Randall*, 67 Mass. 605; *Carr v. Bank*, 107 Mass. 48; *Saylor v. Bushong*, 100 Pa. St. 23; *Kuhn v. Bank*, 11 Atl. Rep. (Pa.) 440; *Bank v. Shoemaker*, 117 Pa. St. 94; *Creveling v. Bank*, 46 N. J. Law, 255; *Moses v. Bank*, 24 Md. 580; *Purcell v. Allemon*, 22 Grat. 742; *Harrison v. Wright*, 100 Ind. 538; *Grammel v. Carmer*, 55 Mich. 201; *Breman v. Bank*, 62 Mich. 343; *Bush v. Foote*, 58 Miss. 5; *Bank v. Merritt*, 7 Heisk. 177; *Pickle v. Muse*, 83 Tenn. 380; *Cashman v. Harrison*, 90 Cal. 297; *Boettcher v. Bank*, 15 Col. 16; *Satterwhite v. Melzer*, 24 Pac. Rep. (Arizona), 184; *Hopkins v. Forester*, L. R. Eq. 74; *Wald's Pollock on Contracts*, 190, 204; 2 Ames' Bills and Notes, 735.

No one of the cases cited carries the doctrine farther than the foregoing. In no one of them is it held that a right to sue in a stranger can be raised by mere implication. Nowhere is it held that the obligation will attach in favor of future creditors not named and not known, and as to amounts not specified or then ascertainable, to the extent of giving to such creditors a right of action on the contract. It must be apparent, even on brief reflection, that it does not follow from these decisions that there is privity between check-holder and bank before acceptance, and that in order to cover the case at bar a marked extension of the doctrine must be made. Reasons urged for such extension, however plausible, do not seem sufficient.

On the contrary, strong reasons against the proposition may be adduced, among others, this: The transaction of giving the check does not, as will be shown further on, substitute the check-holder for the drawer. The latter may maintain an action for the breach of the contract to honor his check, and if the holder has a similar right, the result is that two persons may maintain separate actions upon the same instrument at the same time to recover against the same defendant as a principal debtor. The inference that the right to recover by the check-holder is denied only in the states where a right of recovery is refused to one for whose benefit a contract is made by another, arises from a misapprehension of the authorities. In many states where the right of a check-holder to sue the bank is not assented to, the right of one for whose benefit a contract is made to recover upon it is recognized.¹

It is insisted that the case should not turn alone on the legal idea of privity, for, under our system of procedure, it is immaterial whether the interest of the payee against the bank is legal or equitable, and that the action here may be maintained on equitable grounds. In a well considered case, *Covert v. Rhodes*, 48 Ohio St. 66, this court held that "a bank check or draft for a part of the sum due the drawer, does not, before acceptance by the drawee, constitute an equitable assignment of the amount for which it is drawn." The conclusion is amply sustained by the reasoning of the opinion, and no discussion is necessary. If there is no equitable assignment of the debt *pro tanto*, how can equitable considerations prevail? The proceeding is not an equitable one; and if it were, we do not understand that equity has different rules from those of law with respect to the rights and obligations of parties to negotiable paper. As applicable to such case we believe that reason, and the great preponderance of authority, establish the following conclusions: The relation of bank and general depositor is simply the ordinary one of debtor and creditor, not of agent and principal, or trustee

¹ Citing, *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 N. Y. 178; *Coster v. The Mayor*, 43 N. Y. 399; *Merriman v. Moore*, 90 Pa. St. 78; *Huyler v. Atwood*, 26 N. J. Eq. 504; *O'Neal v. Commissioners*, 27 Md. 240; *Crawford v. Edwards*, 33 Mich. 354; *Miller v. Thompson*, 34 Mich. 10; *Heim v. Vogel*, 69 Mo. 529; *Fitzgerald v. Baker*, 70 Mo. 685; *Cross v. Truesdale*, 28 Ind. 44; *Brice v. King*, 1 Head's (Tenn.) 152; *Green v. Morrison*, 5 Col. 18.

and *cestui que trust*. The bank agrees with its depositor to receive his deposits, to account with him for the amount, to repay to him on demand, and to honor his checks to the amount of his credit when the checks are presented; and for any breach of that agreement the bank is liable to an action by him. The deposits become the absolute property of the bank, impressed with no trust, and the bank's right to use the money for its own benefit is immediate and continuous, which right constitutes the consideration for the bank's promise to the depositor. The bank's agreement with the depositor involves or implies no agreement with the holder of a check. The giving of a check is not an assignment of so much of the creditor's claim; it passes no title, legal or equitable, to the holder in the moneys previously deposited, nor does it create a lien on the fund, for there is no special fund out of which the check can be paid, nor does it transfer any money to the credit of the holder; it is simply an order which may be countermanded and payment forbidden by the drawer any time before it is actually cashed or accepted. If accepted, then the agreement is to pay according to the terms of the check or acceptance; but until then the payee looks exclusively to the drawer. He can maintain no action against the bank, for the bank owes to the payee no legal duty, and an action at law can not be maintained except there is shown to have been a failure in the performance of legal duty. Being liable to the drawer to account with him for failure to honor his check, the bank can not, either on legal or equitable considerations, be held at the same time liable to the holder of the check.

Tested by these rules, the plaintiff could have no cause of action against the bank, and the superior court committed no error in the judgment rendered.

Judgment affirmed.

BAXTER v. CAMP.

SUPREME COURT OF CONNECTICUT, NOVEMBER 29, 1898.

[71 Conn. 245.]

Action to recover damages upon a written instrument in the nature of a promissory note, or for other proper relief, brought in the Court of Common Pleas of New Haven County and tried to the court. The facts were found and judgment rendered for the plaintiff; the defendant appeals for alleged errors in the rulings of the court.

The finding showed these facts: The defendant was married after 1877 to Edith E. Smith, who then had one child, the plaintiff. She furnished him money to use in his business, and he made a will in her favor. She expressed a fear lest he might change it, and he thereupon executed and delivered to her the following paper:

"Madison, June 20th, 1887.

"I do promise to pay my wife's son, Dwight G. Baxter, the sum of eight hundred dollars after her decease, if living, if not to her next heirs to the property, without interest till after her death. ALEXANDER CAMP."

Afterwards, on finding that she had a fatal disease, she gave the paper to the plaintiff, saying the defendant would pay it and there would be no more trouble about it. He gave no consideration to the defendant for it. After her death, he demanded payment, which was refused.¹

Claims were made by the defendant and overruled, that the paper was not a note, that no indebtedness existed from the defendant to the plaintiff, and so that, if any action would lie, it must be one by the administrator of the wife's estate.

Henry G. Newton, for the appellant (defendant).

Oswin H. D. Fowler, for the appellee (plaintiff).

BALDWIN, J.—The main question in this case is whether an action upon a simple contract, by the performance of which a third party would receive a direct benefit, can be maintained by him.

The general principles, upon the application of which the answer must depend, are well settled. Briefly stated, they are these: An action at law for the breach of a contract can only be brought by a party to the contract. It rests on the violation of an obligation to the plaintiff which the defendant had assumed and promised him to perform. If the contract does not state in express terms to whom the promise is made, the law declares that it is made to the person from whom proceeded the consideration by which it is supported. *Treat v. Stanton*, 14 Conn. 445, 451. If it names a party to the contract as the promisee, a third party may maintain an action, the contract not being under seal, on proof that the other acted in the transaction merely as his agent; and so *assumpsit* may be maintained against such a party, though the contract with the agent be under seal, if the principal's interest appears upon its face, and he has accepted the benefit of its performance. *Briggs v. Partridge*, 64 N. Y. 357, 364.

There are certain classes of cases which are often treated as establishing exceptions to these rules of decision, but which can, with at least equal propriety, be deemed illustrations of their rightful application under exceptional conditions.

One class, found mainly in the older English reports and unsupported by the later ones, springs out of contracts in the nature of marriages or family settlements, under which a direct benefit is secured to children or other near relatives. Here the unity of the family has been taken into account, and the consideration of marriage deemed to extend to its issue.

¹ Part of the statement, referring to the genuineness of the defendant's signature, is omitted.

Another class embraces promises of a certain kind, made to one man for the direct, sole, and exclusive benefit of another. Thus C may sue for money paid to A for his use by B, when it was part of their agreement that the payment and its object should be communicated to him. Here A is in the position of a forwarding agent for C, and when the latter is informed of the transaction and assents to it, this may be properly treated as a ratification.

There are other instances, including bailments in trust or to hold for a third person, under circumstances implying the assumption of a specific duty toward him, that can not be brought under the law of principal and agent, under which an equitable action, at least, can be sustained by one not a party to a contract, to secure its benefits; but the remedy can never be pressed beyond the right, and can seldom, if ever, extend to a stranger to the consideration, who is not in some relation of privity with the nominal promisee.¹

Unguarded expressions are to be found in some of the earlier opinions of this court, which countenance the broad proposition that where a promise is made to one man for the benefit of another, the latter may sustain a suit upon that promise; but no such doctrine has ever been applied to govern our determination of a cause.²

The contract which is the foundation of this suit was made between a husband and wife, who married after the Act of 1877, General Statutes, § 2796, went into effect. The defendant had received money from her to use in his business. They evidently meant by this paper to state the amount for which he was to be accountable; to preclude any claim for interest upon it during her life; and to secure it upon her decease to those nearest to her in blood, who would naturally succeed to her estate. The sum thus ascertained is described as "property," and in the event of her surviving her son, was to pass in the ordinary lines of inheritance. Such an instrument can not be regarded as executed for the direct, sole, and exclusive benefit of the plaintiff, nor yet as in the nature of a family settlement. Its immediate object was to protect the interests of his mother. It was the adjustment of an unsettled account, followed by provisions designed to serve the purpose of a testamentary disposition. It does not appear that the parties to the agreement intended or contemplated that the plaintiff should be informed of its existence during his mother's life. It does appear from its face that he could derive no benefit whatever from its provisions, should he not survive her. The only party who can sue at law for a failure to perform it is the personal representative of Mrs. Camp; and the claim made by the defendant in the Court of Common Pleas that, if any such action would lie, it must be one by the administrator of her estate, should have been sustained.

¹ *Citing*, Treat v. Stanton, 14 Conn. 445; Woodbury Savings Bank v. Charter Oak Ins. Co., 29 *id.* 374; Clapp v. Lawton, 31 *id.* 95; Meech v. Ensign, 49 *id.* 191; National Bank v. Grand Lodge, 98 U. S. 123; Exchange Bank v. Rice, 107 Mass. 37; Tweddle v. Atkinson, 1 B. & S. 393; Pollock on Contracts, Chap. v.

² *Citing*, Crocker v. Higgins, 7 Conn. 342; Steene v. Aylesworth, 18 *id.* 244, 252.

It would not be our duty to order a new trial on this account, if the error was one that could not have affected the appellant injuriously. Public Acts of 1897, p. 892, § 15. Such would be its character if the plaintiff could have maintained an action for equitable relief, and compelled the defendant, in that, to account to him for an amount equal to that of the damages which he has recovered in the judgment appealed from. But to any such action the administrator of Mrs. Camp's estate would be an indispensable party, and we can not say that in one brought by him or in which he was made one of the defendants, the same result would have been reached.¹

There is error and a new trial is ordered.

In this opinion the other judges concurred.

¹ Part of the opinion on other points is omitted.

(B). *Whether There Must be a Duty Owing from the Promisee to the Third Person for Whose Benefit the Contract is Made.*

VROOMAN *v.* TURNER.

COURT OF APPEALS OF NEW YORK, APRIL, 1877.

[69 *N. Y.* 280.]

Appeal from judgment of the General Term of the Supreme Court, affirming a judgment in favor of plaintiff, entered upon the report of a referee.¹

This was an action to foreclose a mortgage, executed in August, 1873, by the defendant Evans, who then owned the mortgaged premises. He conveyed them to one Mitchell, and through various *mesne* conveyances the title came to one Sanborn. In none of these conveyances did the grantee assume to pay the mortgage. Sanford conveyed the premises to the defendant Harriet B. Turner, by a deed which contained a clause stating that the conveyance was subject to the mortgage,

"which mortgage the party hereto of the second part hereby covenants and agrees to pay off and discharge, the same forming part of the consideration thereof."

The referee found that said grantee, by so assuming payment of the mortgage, became personally liable therefor, and directed judgment against her for any deficiency. Judgment was entered accordingly.

Edward T. Bartlett, for the appellant.

N. H. Clement, for the respondent.²

ALLEN, J.—The precise question presented by the appeal in this action has been twice before the courts of this state, and received the same solution in each.

It first arose in *King v. Whiteley*, 10 Paige, 465, decided in 1843. There the grantor of an equity of redemption in mortgaged premises, neither legally nor equitably interested in the payment of the bond and mortgage except so far as the same were a charge upon his interest in the lands, conveyed the lands subject to the mortgage, and the conveyance recited that the grantees therein assumed the mortgage, and were to pay off the same as a part of the consideration of such conveyance, and it was held that as the grantor in that conveyance was not personally liable to the holder of the mortgage to pay the same, the grantees were not liable to the holder of such mortgage for the deficiency upon a foreclosure and sale of the mortgaged premises. It was

¹ Reported below, *Vrooman v. Turner* (1876), 8 Hun, 78.

² The arguments are omitted.

conceded by the chancellor that if the grantor had been personally liable to the holder of the mortgage for the payment of the mortgage debt, the holder of such mortgage would have been entitled in equity to the benefit of the agreement recited in such conveyance, to pay off the mortgage and to a decree over against the grantees for the deficiency. This would have been in accordance with a well established rule in equity, which gives to the creditor the right of subrogation to and the benefit of any security held by a surety for the enforcement of the principal debt, and in the case supposed, and by force of the agreement recited in the conveyance, the grantee would have become the principal debtor, and the grantor would be a *quasi* surety for the payment of the mortgage debt.¹

King v. Whitely was followed, and the same rule applied by an undivided court, in *Trotter v. Hughes*, 12 N. Y. 74, and the same case was cited with approval in *Garnsey v. Rogers*, 47 N. Y. 233.

The clause in the conveyance in *Trotter v. Hughes* was not in terms precisely that in *King v. Whitely*, or in the grant under consideration. The undertaking by the grantees to pay this mortgage debt as recited, was not in express terms, or as explicit as in the other conveyances. But the recital was, I think, sufficient to justify the inference of a promise to pay the debt, and so it must have been regarded by the court.

The case was not distinguished by the court in any of its circumstances from *King v. Whitely*, but was supposed to be on all fours with and governed by it. Had the grantor in that case been personally bound for the payment of the debt, I am of the opinion that an action would have been sustained against the grantee upon a promise implied from the terms of the grant accepted by him to pay it, and indemnify the grantor. It must have been so regarded by this court, otherwise no question would have been made upon it, and the court would not have so seriously and ably fortified and applied the doctrine of *King v. Whitely*. A single suggestion that there was no undertaking by the grantee and no personal liability for the payment of the debt assumed by him, would have disposed of the claim to charge him for the deficiency upon the sale of the mortgaged premises.

The rule which exempts the grantee of mortgaged premises subject to a mortgage, the payment of which is assumed in consideration of the conveyance as between him and his grantor, from liability to the holder of the mortgage when the grantee is not bound in law or equity for the payment of the mortgage, is founded in reason and principle, and is not inconsistent with that class of cases in which it has been held that a promise to one for the benefit of a third party may avail to give an action directly to the latter against the promisor, of which *Lawrence v. Fox*, 20 N. Y. 268, is a prominent example. To give a third party who may derive a benefit from the performance of the promise, an action, there must be, *first*, an intent by the promisee to secure

¹ Citing, *Halsey v. Reed*, 9 Paige, 446; *Curtis v. Tyler*, *id.* 432; *Burr v. Beers*, 24 N. Y. 178.

some benefit to the third party, and, *second*, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally.

It is true there need be no privity between the promisor and the party claiming the benefit of the undertaking, neither is it necessary that the latter should be privy to the consideration of the promise, but it does not follow that a mere volunteer can avail himself of it. A legal obligation or duty of the promisee to him will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promisee furnishing evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promisor. A mere stranger can not intervene, and claim by action the benefit of a contract between other parties. There must be either a new consideration or some prior right or claim against one of the contracting parties, by which he has a legal interest in the performance of the agreement.

It is said in *Garnsey v. Rogers*, 47 N. Y. 233, that it is not every promise made by one person to another from the performance of which a third person would derive a benefit that gives a right of action to such third person, he being privy neither to the contract nor the consideration. In the language of Judge Rapallo, "to entitle him to an action, the contract must have been made for his benefit. He must be the party intended to be benefited." See also *Turk v. Ridge*, 41 N. Y. 201, and *Merrill v. Green*, 55 N. Y. 270, in which, under similar agreements, third parties sought to maintain an action upon engagements by the performance of which they would be benefited, but to which they were not parties, and failed. The courts are not inclined to extend the doctrine of *Lawrence v. Fox* to cases not clearly within the principle of that decision. Judges have differed as to the principle upon which *Lawrence v. Fox* and kindred cases rest, but in every case in which an action has been sustained there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise. Whether the decisions rest upon the doctrine of agency, the promisee being regarded as the agent for the third party, who, by bringing his action adopts his acts, or upon the doctrine of a trust, the promisor being regarded as having received money or other thing for the third party, is not material. In either case there must be a legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit.

In *Lawrence v. Fox* a prominent question was made *in limine*, whether the debt from Halley to the plaintiff was sufficiently proved by the confession of Halley made at the time of the loan of the money to the defendant. It was assumed that if there was no debt proved the action would not lie, and the declaration of Halley the debtor was held suffi-

cient evidence of the debt. Gray, J., said: "All the defendant had the right to demand in this case was evidence which as between Halley and the plaintiff was competent to establish the relation between them of debtor and creditor." In *Burr v. Beers*, 24 N. Y. 178, and *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253, the grantor of the defendant was personally liable to pay the mortgage to the plaintiff, and the cases were therefore clearly within the doctrine of *Lawrence v. Fox*, *Halsey v. Reed*, 9 Paige, 446, and *Curtis v. Tyler*, 9 Paige, 432. See also, per Bosworth, J., *Doolittle v. Naylor*, 2 Bos. 225, and *Ford v. Davis*, 1 Bos. 569.¹

It is claimed that *King v. Whitely* and the cases following it were overruled by *Lawrence v. Fox*. But it is very clear that it was not the intention to overrule them, and that the cases are not inconsistent. The doctrine of *Lawrence v. Fox*, although questioned and criticised, was not first adopted in this state by the decision of that case. It was expressly adjudged as early as 1825, in *Farley v. Cleveland*, 4 Cow. 432, affirmed in the court for the correction of errors in 1827 *per totam curiam*, and reported in 9 Cow. 639. The chancellor was not ignorant of these decisions when he decided *King v. Whitely*, nor was Judge Denio and his associates unaware of them when *Trotter v. Hughes* was decided, and Judge Gray in *Lawrence v. Fox* says the case of *Farley v. Cleveland* had never been doubted.

¹ In *Thorp v. The Keokuk Coal Co.* (1872), 48 N. Y. 253, cited in the text, the Keokuk Coal Co. had accepted a deed containing a clause that the conveyance was subject to a certain mortgage made by the grantor, and that the payment of that mortgage "is hereby assumed by the party of the second part hereto." By the terms of the bonds accompanying the mortgage it was made a condition that on default in the payment of interest or principal recourse must be first had to the land mortgaged, and that the obligors should only be answerable for a deficiency after foreclosure and sale. The bond not having been paid when due, the mortgagee sued the grantee in the deed, the Keokuk Coal Co., without instituting any proceeding to foreclose. Said the Court, per EARL, C., "This brings us to the only other question in the case, and that is whether the plaintiff could recover without first foreclosing his mortgage. In the deed from Franklin to it, the defendant expressly assumed to pay the plaintiff's mortgage, and this, as it is now well settled, binds the defendant to the same extent as if it had also signed the deed. There has been some diversity of opinion as to the ground upon which the liability of the grantee in a deed in such case must rest, and it has finally been settled that it may rest upon the doctrine, that where one person makes a promise to another for the benefit of a third person, the third person may maintain an action upon it. (*Burrs v. Beers*, 24 N. Y. 178.) In such a case it is not needed that there should be any consideration passing from the third person. It is sufficient if the promise be made by the promisor upon a sufficient consideration passing between him and his immediate promisee, and when the third person adopts the act of the promisee in obtaining the promise for his benefit, he is brought into privity with the promisor, and he may enforce the promise, as if it were made directly to him. (*Lawrence v. Fox*, 20 N. Y. 268.)

The defendant, for a sufficient consideration passing between it and Franklin, agreed to pay the amount of the mortgage debt to the plaintiff. This the defendant agreed to do personally and absolutely, and not upon condition that resort should first be had to the land by foreclosure of the mortgage. It matters not that the mortgagor was not liable to pay personally until after the foreclosure, and that he was then liable only for the deficiency. It would have made no difference if he had not been liable at all, the defendant having promised, upon a sufficient consideration, to pay the debt. This suit is not primarily upon the bond and mortgage, but upon the promise of the defendant to pay it; and this promise binds the defendant to pay the mortgage debt as it falls due, according to the terms of the bond and mortgage. It was not a conditional or contingent promise, and could not be discharged by payment only of a portion of the debt.

The court below erred in giving judgment against the appellant for the deficiency after the sale of the mortgaged premises, and so much of the judgment as directs her to pay the same must be reversed with costs.

All concur, except Earl, J., dissenting.

Judgment accordingly.

KELLER v. ASHFORD.

UNITED STATES SUPREME COURT, MARCH 3, 1890.

[133 U. S. 610.]

This was a bill in equity by Henrietta C. Keller, the holder of a promissory note for \$2,000, made by one Thompson, secured by his mortgage of land in Washington, against Francis A. Ashford as grantee of the land subject to this mortgage, and who by the terms of the deed to him assumed payment of incumbrances on the land. The bill prayed for a decree in the plaintiff's favor against Ashford for the amount of that note, and for general relief. The case was heard upon pleadings and proofs, by which it appeared to be as follows :

On August 17, 1875, Thompson, being seized in fee of lot 5 in square 889 in the city of Washington, conveyed it to one Rohrer, by a deed of trust in the nature of a mortgage, to secure the payment of Thompson's promissory note of that date for \$1,500, payable in three years with interest at ten per cent, held by one Harkness.

On February 21, 1876, Thompson conveyed the same lot by like deed of trust to one Gordon, to secure the payment of Thompson's note of that date for \$2,000, payable in one year, with interest at eight per cent yearly until paid, to the order of Moses Kelly ; and Kelly endorsed this note for full value to the plaintiff.

On January 1, 1877, Thompson, at the instance and persuasion of Kelly, executed and acknowledged and delivered to Kelly a deed, expressed to be made in consideration of the sum of \$4,500; conveying this lot, together with lots 6, 7 and 8 in the same square (each of which three other lots was also in fact subject to a mortgage for \$2,000) to Ashford in fee,

"subject, however, to certain incumbrances now resting thereon, payment of which is assumed by said party of the second part ;"

and containing covenants by the grantor of warranty against all persons claiming from, under, or through him, and for further assurance.

At the date of this deed, the only incumbrances on the land conveyed were the five mortgages above mentioned, and some unpaid taxes assessed against Thompson while owner of the land. On January 22, 1877, this deed, together with a notary's certificate of acknowledg-

ment by the grantor, was recorded in the registry of the District of Columbia.

At the taking of the depositions before the examiner, the plaintiff, having given notice to Ashford and to Kelly to produce the original deed, and both of them having failed to do so, was permitted, against the defendant's objection, to put in evidence a copy of the deed and acknowledgment, certified by the recorder to be a true copy.

No consideration was actually paid for the conveyance. The value of the lots conveyed was, according to Thompson's testimony, \$4,000 each or \$16,000 in all, or, according to Ashford's testimony, not less than \$3,400 each or \$13,600 in all.

Thompson testified that he never had any negotiations with Ashford about the property; and that he was induced to make this deed by the assurance of Kelly that the grantee would assume the incumbrances upon the land and relieve him from liability upon the notes he had given secured by mortgage.

Ashford testified that he never had any negotiations with any one about the purchase of the land; and that in February, 1877, Kelly, who was his father-in-law, to whom he had lent much money and for whom he had indorsed several notes, told him that, in order to secure him from loss, he had procured a conveyance to be made to him of these four lots, in which he thought "there was considerable equity;" informed him at the same time that there were incumbrances or mortgages upon the property, but did not specifically mention any of them, except the \$1500 mortgage upon Lot 5; told him that the interest on this was pressing, and that, if he would pay it, Kelly would relieve him from any further trouble as to the incumbrances; and advised him to go on and collect the rents of the property, so as to indemnify himself against that interest and pay the taxes in arrears.

It was proved that Ashford in March, 1877, entered into possession of the four lots, and paid the taxes previously assessed upon them, and also paid interest accruing under the mortgage for \$1500 on lot 5, and collected the rents of the four lots, until December 4, 1877, when he sold and conveyed lots 7 and 8 to one Duncan, subject to existing incumbrances thereon; and continued to collect the rents of the other two lots, and to pay the interest accruing under the mortgage for \$1500 on lot 5, until March 14, 1878, when this lot was sold, pursuant to the provision of that mortgage, by public auction and conveyed to Harkness for the sum of \$1700, which was insufficient to satisfy the amount then due on that mortgage.

On comparing Ashford's testimony with that of Boarman, the plaintiff's attorney, with a letter written by Ashford to Boarman on October 3, 1877, it clearly appears that Ashford was informed of the clause in the deed to him, assuming payment of incumbrances, and was requested to pay the plaintiff's mortgage, as early as September, 1877, and then, as well as constantly afterwards, declined to pay it, or to recognize any

personal liability to do so. There was no direct evidence that he knew of this clause before September, 1877.

The plaintiff brought an action at law upon the note against Thompson as maker and Kelly as endorser on November 13, 1877, and recovered judgment against both in December, 1877, on which execution issued and was returned unsatisfied, April 15, 1878.

The present bill was filed May 13, 1878. A decree dismissing the bill was rendered in special term, May 9, 1882, which, after the death of Ashford and the substitution of his executrix in his stead, was affirmed in general term, February 16, 1885, upon the grounds that Ashford had never accepted the deed to him, and also that the plaintiff's remedy, if any, was at law. 3 Mackey, 455. On the same day, as the record states, "from this decree the plaintiff appeals in open court to the Supreme Court of the United States, which appeal is allowed." The appeal bond was approved February 18 and the appeal was entered in this court April 10, 1885.

The case was argued upon a motion to dismiss the appeal for want of sufficient amount in controversy to give this court jurisdiction, as well as upon the merits.

Mr. Walter D. Davidge (with whom was *Mr. William W. Boarman* on the brief), for appellant.

Mr. George F. Appleby and *Mr. Calderon Carlisle*, for appellee.¹

MR. JUSTICE GRAY, after stating the case as above reported, delivered the opinion of the court.

The motion to dismiss for want of jurisdiction must be denied. . . .²

But upon the merits of the case we are unable to concur with the views expressed by the court below, in its opinion reported in 3 Mackey, 455, either as to the effect of the testimony, or as to the rights of the parties. The material facts, as they appear to us upon full examination of the record, have been already stated. It remains to consider the law applicable to those facts.

The questions to be decided concern the extent, the obligation, and the enforcement of the agreement created by the clause in the deed of conveyance from Thompson to Ashford of this and three other lots,

"subject, however, to certain incumbrances now resting thereon, payment of which is assumed by said party of second part."

The five mortgages made by the grantor, namely, the plaintiff's mortgage for \$2,000, and a prior mortgage for \$1,500 on lot 5, and a mortgage of \$2,000 on each of the three other lots, and some unpaid taxes which had been assessed against the grantor, were incumbrances, and were the only incumbrances existing upon the granted premises at the time of the execution of this conveyance. Rawle on Covenants

¹ The arguments are omitted.

² The reasons of the court on this question of jurisdiction are omitted.

(5th ed.) § 77. The clause in question, by the words "certain incumbrances now resting thereon," designates and comprehends all those mortgages and taxes, as clearly as if the words used had been "the incumbrances," or "all incumbrances," or had particularly described each mortgage and each tax. We give no weight to Thompson's testimony as to Kelly's previous conversation with him to the same effect, because that conversation is not shown to have been authorized by or communicated to Ashford, and can not affect the legal construction of the deed as against him.

It was argued that, because the deed contains a covenant of special warranty against all persons claiming under the grantor, the words "certain incumbrances" can not include the mortgages made by the grantor, but must be limited to the unpaid taxes which, it is said, would not come within the covenant of special warranty. But the answer to this argument is that any person claiming title by virtue of a lien created by taxes assessed against the grantor would claim under the grantor, equally with one claiming by a mortgage from him; and incumbrances expressly assumed by the grantee are necessarily excluded from the covenants of the grantor.

Ashford is not shown to have had any knowledge of the conveyance at the time of its execution; and a suggestion was made in argument, based upon some vague expressions in his testimony, that the conveyance was intended to be made to him, by way of mortgage only, to secure him against loss on his previous loans to and endorsements for Kelly. But his subsequent acts are quite inconsistent with the theory that the conveyance did not vest the legal estate in him absolutely.

Within a month or two after the conveyance, having been told that the four lots had been conveyed to him and were subject to incumbrances, (although perhaps not then informed of the amount of the incumbrances), he entered into possession of the lots, and thenceforth collected the rents; and within nine months after the conveyance he had notice of the clause assuming payment of incumbrances, and was requested to pay the plaintiff's mortgage, and declined to pay it or to recognize any personal liability for it; yet he afterwards sold and conveyed away two of the lots, and continued to keep possession and to collect rents of the other two. Having thus accepted the benefit of the conveyance, he can not repudiate the burden imposed upon him by the express agreement therein, and would clearly have been liable to his grantor for any breach of that agreement.¹

The case therefore stands just as if Ashford had himself received a deed by which he in terms agreed to pay a mortgage made by the grantor. In such a case, according to the general, not to say uniform, current of American authority, as shown by the cases collected in the briefs of counsel, the mortgagee is entitled in some

¹ *Citing*, *Blyer v. Monholland*, 2 Sandf. Ch. 478; *Coolidge v. Smith*, 129 Mass. 554; *Locke v. Homer*, 131 Mass. 93; *Muhlig v. Fiske*, 131 Mass. 110.

form to enforce the agreement against the grantee; and much of the argument at the bar was devoted to the question whether his remedy should be at law or in equity.

Upon the question whether the mortgagee could sue at law there is no occasion to examine the conflicting decisions in the courts of the several States, because it is clearly settled in this court that he could not.

This case can not be distinguished from that of *National Bank v. Grand Lodge*, 98 U. S. 123, and clearly falls within the general rule upon which the judgment in that case was founded.

It was there held that a contract by which the Grand Lodge, for a consideration moving from another corporation, agreed with it to assume the payment of its bonds, would not support an action against the Grand Lodge by a holder of such bonds; and Mr. Justice Strong, delivering judgment, after observing that the contract was made between and for the benefit of the two corporations, that the holders of the bonds were not parties to it, and that there was no privity between them and the Grand Lodge, said: "We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and a defendant is necessary to the maintenance of an action of *assumpsit*. The subject has been much debated, and the decisions are not all reconcilable. No doubt, the general rule is, that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control, which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raised from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it, (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor can not sue. His case is not an exception from the general rule that privity of contract is required." 98 U. S. 124. See also *Cragin v. Lovell*, 109 U. S. 194.

In the earlier case of *Hendrick v. Lindsay*, 93 U. S. 143, cited by the defendant, a request, accompanied by a promise of indemnity, to one person, to sign an appeal bond, was construed to include another person who signed it as surety, and therefore to support a joint action by the principal and the surety, both of whom had signed the bond

relying upon the promise, so that the only consideration of the promise moved from them.

In the case at bar, the promise of Ashford was to Thompson and not to the mortgagees, and there was no privity of contract between them and Ashford. The consideration of the promise moved from Thompson alone. The only object of the promise was to benefit him, and not to benefit the mortgagees or other incumbrancers; and they did not know of or assent to the promise at the time it was made, nor afterwards do or omit any act on the faith of it. It is clear, therefore, that Thompson only could maintain an action at law upon that promise.

In equity, as at law, the contract of the purchaser to pay the mortgage, being made with the mortgagor and for his benefit only, creates no direct obligation of the purchaser to the mortgagee.¹

But it has been held by many state courts of high authority, in accordance with the suggestion of Lord Hardwicke in *Parsons v. Freeman*, Ambler, 116, that in a court of equity the mortgagee may avail himself of the right of the mortgagor against the purchaser.

This result has been attained by a development and application of the ancient and familiar doctrine in equity that a creditor shall have the benefit of any obligation or security given by the principal to the surety for the payment of the debt.²

In *Hampton v. Phipps*, just cited, this court declared the doctrine to be well settled, and applicable "equally between sureties, so that securities placed by the principal in the hands of one, to operate as an indemnity by payment of the debt, shall enure to the benefit of all;" and declined to apply the doctrine to the case before it, because the mortgage in question was given by one surety to another merely to indemnify him against being compelled to pay a greater share of the debt than the sureties had agreed between themselves that he should bear, and he had not been compelled to pay a greater share.

The doctrine of the right of a creditor to the benefit of all securities given by the principal to the surety for the payment of the debt does not rest upon any liability of the principal to the creditor, or upon any peculiar relation of the surety towards the creditor; but upon the ground that the surety, being the creditor's debtor, and in fact occupying the relation of surety to another person, has received from that person an obligation or security for the payment of the debt, which a court of equity will therefore compel to be applied to that purpose at the suit of the creditor. Where the person ultimately held liable is himself a debtor to the creditor, the relief awarded has no reference to that fact,

¹ Citing, *Parsons v. Freeman*, 2 P. Wms. 664, note; *S. C. Ambler*, 115; *Oxford v. Rodney*, 14 Ves. 417, 424; *In re Empress Engineering Co.*, 16 Ch. D. 125; *Gandy v. Gandy*, 30 Ch. D. 57, 67.

² Citing, *Maure v. Harrison*, 1 Eq. Cas. Ab. 93, pl. 5; *Bac. Ab. Surety*, D. 4; *Wright v. Morley*, 11 Ves. 12, 22; *Phillips v. Thompson*, 2 Johns. Ch. 418; *Curtis v. Tyler*, 9 Paige, 432, 435; *New Bedford Institution for Savings v. Fairhaven Bank*, 9 Allen, 175; *Hampton v. Phipps*, 108 U. S. 260, 263.

but is grounded wholly on the right of the creditor to avail himself of the right of the surety against the principal. If the person, who is admitted to be the creditor's debtor stands at the time of receiving the security, in the relation of surety to the person from whom he receives it, it is quite immaterial whether that person is or ever has been a debtor of the principal creditor, or whether the relation of suretyship or the indemnity to the surety existed, or was known to the creditor, when the debt was contracted. In short, if one person agrees with another to be primarily liable for a debt due from that other to a third person, so that as between the parties to the agreement the first is the principal and the second the surety, the creditor of such surety is entitled, in equity, to be substituted in his place for the purpose of compelling such principal to pay the debt.

It is in accordance with the doctrine, thus understood, that the Court of Chancery of New York, the Court of Chancery and the Court of Errors of New Jersey, and the Supreme Court of Michigan have held a mortgagee to be entitled to avail himself of an agreement in a deed of conveyance from the mortgagor by which the grantee promises to pay the mortgage.¹

The grounds and the limits of the doctrine, as applied to such a case, have been well stated by Mr. Justice Depue, delivering the unanimous judgment of the Court of Errors of New Jersey, in *Crowell v. St. Barnabas Hospital* [1876], as follows:

"The right of a mortgagee to enforce payment of the mortgage debt, either in whole or in part, against the grantee of the mortgagor, does not rest upon any contract of the grantee with him, or with the mortgagor for his benefit."

"The purchaser of lands subject to mortgage, who assumes and agrees to pay the mortgage debt, becomes, as between himself and his vendor, the principal debtor, and the liability of the vendor, as between the parties, is that of surety. If the vendor pays the mortgage debt, he may sue the vendee at law for the money so paid.

"In equity, a creditor may have the benefit of all collateral obligations for the payment of the debt, which a person standing in the situation of a surety for others holds for his indemnity. It is in the application of this principle that decrees for deficiency in foreclosure suits have been made against subsequent purchasers, who have assumed the payment of the mortgage debt, and thereby become principal debtors as between themselves and their grantors."

¹ *Citing*, *Halsey v. Reed*, 9 Paige, 446, 452; *King v. Whitely*, 10 Paige, 465; *Blyer v. Monholland*, 2 Sandf. Ch. 478; *Klapworth v. Dressler*, 2 Beasley, 62; *Hoy v. Bramhall*, 4 C. E. Green, 74, 563; *Crowell v. Currier*, 12 C. E. Green, 152; S. C. on appeal, *nom.* *Crowell v. St. Barnabas Hospital*, 12 C. E. Green, 650; *Arnaud v. Grigg*, 2 Stew. Eq. 482; *Youngs v. Trustees of Public Schools*, 4 Stew. Eq. 290; *Crawford v. Edwards*, 33 Mich. 354, 360; *Miller v. Thompson*, 34 Mich. 10; *Higman v. Stewart*, 38 Mich. 513, 523; *Hicks v. McGarry*, 38 Mich. 667; *Booth v. Connecticut Ins. Co.*, 43 Mich. 299.

Citing also, *Pardee v. Treat*, 82 N. Y. 385, 387; *Coffin v. Adams*, 131 Mass. 133, 137; *Biddel v. Brizzolara*, 64 Cal. 354; *George v. Andrews*, 60 Md. 26; *Osborne v. Cabell*, 77 Va. 462.

"But the right of the mortgagee to this remedy does not result from any fixed or vested right in him, arising either from the acceptance by the subsequent purchaser of the conveyance of the mortgaged premises, or from the obligation of the grantee to pay the mortgage debt as between himself and his grantor. Though the assumption of the mortgage debt by the subsequent purchaser is absolute and unqualified in the deed of conveyance, it will be controlled by a collateral contract made between him and his grantor, which is not embodied in the deed. And it will not in any case be available to the mortgagee, unless the grantor was himself personally liable for the payment of the mortgage debt.

"Recovery of the deficiency after sale of the mortgaged premises, against a subsequent purchaser, is adjudged in a court of equity to a mortgagee not in virtue of any original equity residing in him. He is allowed, by a mere rule of procedure, to go directly as a creditor against the person ultimately liable, in order to avoid circuity of action, and save the mortgagor, as the intermediate party, from being harassed for the payment of the debt, and then driven to seek relief over against the person who has indemnified him, and upon whom the liability will ultimately fall. The equity on which his relief depends is the right of the mortgagor against his vendee, to which he is permitted to succeed by substituting himself in the place of the mortgagor." 12 C. E. Green. 655, 656.

The decisions of this court, cited for the defendant, are not only quite consistent with this conclusion, but strongly tend to define the true position of a mortgagee, who has in no way acted on the faith of, or otherwise made himself a party to, the agreement of the mortgagor's grantee to pay the mortgage; holding, on the one hand, that such a mortgagee has no greater right than the mortgagor has against the grantee, and therefore can not object to the striking out by a court of equity, or to the release by the mortgagor, of such an agreement when inserted in the deed by mistake; *Elliott v. Sackett*, 108 U. S. 132; *Drury v. Hayden*, 111 U. S. 223; and, on the other hand, that such an agreement does not, without the mortgagee's assent, put the grantee and the mortgagor in the relation of principal and surety towards the mortgagee, so that the latter, by giving time to the grantee, will discharge the mortgagor. *Shepherd v. May*, 115 U. S. 505, 511.

The present case is a strong one for the application of the general doctrine. The land has been sold under a prior mortgage for a sum insufficient to pay that mortgage, leaving nothing to be applied towards the payment of the mortgage held by the plaintiff; and the plaintiff has exhausted her remedy against the mortgagor personally, by recovering judgment against him, execution upon which has been returned unsatisfied.

Although the mortgagor might properly have been made a party to this bill, yet as no objection was taken on that ground at the hearing,

and the omission to make him a party can not prejudice any interest of his, or any right of either party to this suit, it affords no ground for refusing relief.¹

*Decree reversed, and case remanded with directions to enter a decree for the plaintiff.*²

¹ Citing, *Mechanics' Bank v. Seton*, 1 Pet. 299; *Whiting v. Bank of United States*, 13 Pet. 6; *Miller v. Thompson*, 34 Mich. 10.

² Compare *Willard v. Wood* (1890), 135 U. S. 309, where GRAY, J., delivering the opinion of the United States Supreme Court, remarks: "This action is brought by a mortgagee against the executrix of the grantee named therein, and who has accepted a deed executed by the mortgagor only, expressed to be 'subject to the mortgage,' and by the terms of which the grantee 'assumes and covenants to pay, satisfy and discharge' the mortgage debt. . . .

"The decisions of the courts of New York, though proceeding upon various and not always consistent reasons, clearly show that by the laws of that state (in which the land is situated, and the bond and mortgage, as well as the subsequent deed from the mortgagor, were executed and delivered), the mortgagee is entitled to maintain a suit either in equity or at law, against the grantee of the mortgagor, to enforce the payment of the mortgage debt. *Halsey v. Reed*, 9 Paige, 446; *King v. Whitely*, 10 Paige, 465; *Blyer v. Monholland*, 2 Sandf. Ch. 478; *Trotter v. Hughes*, 12 N. Y. 74; *Burr v. Beers*, 24 N. Y. 178; *Campbell v. Smith*, 71 N. Y. 26; *Pardee v. Treat*, 82 N. Y. 385; *Hand v. Kennedy*, 83 N. Y. 149; *Bowen v. Beck*, 94 N. Y. 86.

"Assuming that the mortgagee has acquired by the law of New York a right to enforce such an agreement against a grantee of the mortgagor, the form of his remedy, whether it must be in *covenant* or in *assumpsit*, at law or in equity, is governed by the *lex fori*, the law of the District of Columbia, where the action was brought. *Dixon v. Ramsay*, 3 Cranch, 319, 324; *U. S. Bank v. Donnally*, 8 Pet. 361; *Wilcox v. Hunt*, 13 Pet. 378; *Leroy v. Beard*, 8 How. 451; *Pritchard v. Norton*, 106 U. S. 124, 130, 133. . . .

"In the District of Columbia, the only remedy of the mortgagee against the grantee was, as adjudged upon great consideration in *Keller v. Ashford*, by bill in equity, in which he might avail himself of the right of the mortgagor against his grantee, because in equity a creditor is entitled to avail himself of a security which his debtor holds from a third person for the payment of the debt. In the Supreme Court of the District of Columbia, as in the Circuit Court of the United States, the jurisdiction in equity is distinct from the jurisdiction at law, and equitable relief can not be granted in an action at law.

"A statement of facts agreed by the parties, or technically speaking, a case stated, in an action at law, doubtless waives all questions of pleading, or of form of action, which might have been cured by amendment; but it can not enable a court of law to assume the jurisdiction of a court of equity. For these reasons, this action can not be maintained."

See further, *Willard v. Wood* (1896), 164 U. S. 502, 519; *Green v. Turner* (1897), 80 Fed. Rep. 41, 42; *Green v. Turner* (1898), 86 Fed. Rep. 837, 838.

Accord also, *Woodcock v. Bostic* (1896), 118 N. C. 822. Compare *New York Security Co. v. Louisville Co.* (1899), 97 Fed. Rep. 226, 232.

DURNHERR v. RAU.

COURT OF APPEALS OF NEW YORK, OCTOBER, 1892.

[135 N. Y. 219.]

Appeal from an order of the General Term of the Supreme Court, which affirmed an order entered upon the minutes, setting aside a verdict in favor of plaintiff and granting a new trial.

This was an action to recover damages for an alleged breach of covenant in a deed from Emanuel Durnherr, plaintiff's husband, to defendant.

The facts, so far as material, are stated in the opinion.

Theodore Bacon, for appellant.

William E. Edmonds, for respondent.¹

ANDREWS J.—The deed from Emanuel Durnherr to the defendant recited that it was given in payment of a debt owing by the grantor to the grantee of \$660, "and the further considerations expressed herein." The grantee covenanted in the deed to pay all incumbrances on the premises "by mortgage or otherwise." This constitutes the only "further consideration" on his part expressed therein. The deed also declared that the wife of the grantor (the plaintiff) reserved her right of dower in the premises. The conveyance contained a covenant of general warranty by the grantor, and the only legal operation of the clause respecting the dower of the wife was to limit the scope of the warranty by excluding therefrom her dower right. By the foreclosure of the mortgages on the premises existing at the time of the conveyance, in which (as is assumed) the wife joined, the title has passed to purchasers on the foreclosure, and the inchoate right of dower in the wife has been extinguished. This action is brought by the wife on the defendant's covenant in the deed, and she seeks to recover as damages the value of her inchoate right of dower, which was cut off by the foreclosure.

The courts below denied relief, and we concur in their conclusion. The covenant was with the husband alone. He had an interest in obtaining indemnity against his personal liability for the mortgage debts, and this, presumably, was his primary purpose in exacting from the grantee a covenant to pay the mortgages. The cases also attribute to the parties to such a covenant the further purpose of benefiting the holder of the securities, and the natural scope of the covenant is expended so as to give them a right of action at law on the covenant, in case of breach, as though expressly named as covenantees. *Burr v. Beers*, 24 N. Y. 178. But the wife was not a party to the mortgages, and in no way bound to pay them. She had an interest that they should be paid without resort to the land, so that her inchoate right of

¹ The arguments are omitted.

dower might be freed therefrom. The husband, however, owed her no duty enforceable in law or equity to pay the mortgages to relieve her dower. The most that can be claimed is that the mortgages having (as is assumed) been executed to secure his debts, and he having procured the wife to join in them and pledge her right for their payment he owed her a moral duty to pay the mortgages, and thereby restore her to her original situation. But according to our decisions no legal or equitable obligation, of which the law can take cognizance, was created in favor of the wife against the husband or his property by these circumstances. She was not in the position of a surety for her husband. Her joinder in the mortgages was a voluntary surrender of her right for the benefit of the husband, and bound her interest to the extent necessary to protect the securities. *Manhattan Co. v. Evertson*, 6 Pai. 467; *Hawley v. Bradford*, 9 id. 200. There is lacking in this case the essential relation of debtor and creditor between the grantor and a third person seeking to enforce such a covenant, or such a relation as makes the performance of the covenant at the instance of such third person a satisfaction of some legal or equitable duty owing by the grantor to such person, which must exist according to the cases in order to entitle a stranger to the covenant to enforce it. It is not sufficient that the performance of the covenant may benefit a third person. It must have been entered into for his benefit, or at least such benefit must be the direct result of performance and so within the contemplation of the parties, and in addition the grantor must have a legal interest that the covenant be performed in favor of the party claiming performance.¹

The application of the doctrine of *Lawrence v. Fox*, 20 N. Y. 268, to this case would extend it much further than hitherto, and this can not be permitted in view of the repeated declarations of the court that it should be confined to its original limits.

The order should be affirmed, and judgment absolute ordered for the defendant with costs.

All concur.

Order affirmed and judgment accordingly.

¹ Citing, *Garnsey v. Rogers*, 47 N. Y. 233; *Vrooman v. Turner*, 69 N. Y. 280; *Lorillard v. Clyde*, 122 N. Y. 498.

WAGER v. LINK, Impleaded with SULLY *et al.*

COURT OF APPEALS OF NEW YORK, OCTOBER 30, 1896.

[150 N. Y. 549.]

Appeal from a judgment of the General Term of the Supreme Court affirming a judgment for a deficiency in a foreclosure.

The action was brought to foreclose a mortgage made by Jennie E. Sully and her husband, to the plaintiff, February 10, 1869, securing the payment of \$5,750 in fifteen years from April 1, 1869, according to the conditions of a bond of the same date made by the mortgagor. The mortgage was a purchase-money mortgage, given upon conveyance of the mortgaged premises by the plaintiff and his wife to Jennie E. Sully.

On June 16, 1873, Jennie E. Sully and her husband conveyed the mortgaged premises to Giles B. Kellogg by a quit-claim deed, which contained no covenants. On February 17, 1874, Kellogg executed and delivered to the plaintiff his bond under seal in the penalty of \$10,000, with condition for payment of

"the sum of \$5,750 in fifteen years from April 1, 1869, with interest payable semi-annually from October 1, 1872, on each and every first day of April and October, with the privilege to the said obligor of paying not less than \$500 nor more than \$1,000 on any first day of October, on giving three months' previous notice of his intention so to do (this bond being given as collateral to a bond and mortgage for \$5,750, executed by Jennie E. Sully and Edward P. Sully, her husband, to said obligee, dated February 10, 1869, and the said obligor having become the owner of the mortgaged premises) in case of default in the payment of said interest or principal the said obligee, or his assigns, shall exhaust his remedy against the mortgaged premises before enforcing this bond."

By warranty deed, dated March 30, 1875, Kellogg and his wife conveyed the mortgaged premises to the defendant Thomas B. Link, in consideration of \$10,000,

"subject to the payment by the said party of the second part of a mortgage on said premises, held and owned by M. Francis Wager for \$5,750, with interest from April 1, 1875, payable semi-annually, which said mortgage with interest as aforesaid the said party of the second part hereby assumes and agrees to pay as a part of the purchase money of said premises, and the amount of which mortgage constitutes a part of said sum of \$10,000, the consideration named in this deed."

As part of the relief sought by the plaintiff, he demanded judgment against the defendant Link for any deficiency that might remain after application of the proceeds of sale to the payment of the amount due on the mortgage.

Further facts are stated in the opinion.

Charles E. Patterson, for appellant.

E. R. Harder and *G. R. Donnan*, for respondent.¹

ANDREWS, CH. J.—The main controversy in this case was determined by the Second Division of this court on the former appeal (134 N. Y. 122),² which was taken from a judgment adjudging that the defendant Link was not liable for any deficiency which might arise on the sale under the judgment of foreclosure. It was held by this court that the principle of equity that the creditor is entitled to the benefit of a collateral obligation for the payment of the debt, received by one himself liable therefor, from a person who had undertaken to indemnify the former against his liability, applies to the situation, and that Link, who in his conveyance from Kellogg covenanted to pay the mortgage, was chargeable with any deficiency arising on the foreclosure sale. The judgment of the Supreme Court was, therefore, reversed as to the part appealed from, namely, the part exonerating Link from liability, and a new trial as to that question was awarded.

Meanwhile the original judgment directing a sale of the premises (from which part of the judgment no appeal has been taken), had been executed, and the premises on the sale were bid off by the plaintiff for a sum much less than the amount unpaid on the mortgage. The courts below on the second trial followed the law as declared on the first appeal to this court and rendered judgment against the defendant Link for the deficiency as ascertained by the sale and the subsequent proceedings.

It is insisted by the learned counsel for the defendant Link, that the decision on the former appeal to this court adjudging that his covenant in the deed from Kellogg inured to the benefit of the holder of the mortgage, and entitled the latter to enforce it to the extent of any deficiency arising on the foreclosure, is a departure from, or at least an extension of the doctrine of equitable subrogation as heretofore understood and applied. We are unable to concur in this contention. We think that the decision of this court on the former appeal is in precise conformity with the principle of equitable subrogation applied to the situation of creditor, and a person who has obligated himself to pay the debt by covenant, with one who had become obligated for its payment.

By the deed from Kellogg, Link acquired the legal title to the land. He assumed the payment of the mortgage as a part of the consideration of the purchase. Kellogg's title was derived under a quit-claim deed from the mortgagors, containing no covenant of assumption, and so far as appears he never entered into any covenant or agreement with them to assume or to pay the mortgage. If there was nothing more it would be plain under the decisions in this state, commencing with *King v. Whitely*,³ that the plaintiff would not be entitled to enforce Link's cov-

¹ The arguments are omitted.

² See note at end of this case.—*Ed.*

³ 10 Paige 465 (1843).

enant in the deed from Kellogg. But Kellogg by his bond of February 17, 1874, executed directly to the plaintiff, the consideration of which is not questioned, did connect himself with the original obligation and became bound to pay the part of the mortgage debt which should remain unsatisfied after the remedy against the land should be exhausted. This bond, although given subsequently to his acquiring the title to the land, was executed and delivered before his conveyance to Link, and it does not admit of doubt that it created an obligation on the part of Kellogg which could have been enforced in the present action, if the plaintiff had made Kellogg a party, and sought relief against him on the bond. When Kellogg took the covenant from Link he had an interest to protect himself against his liability on the bond. It was, it is true, a personal covenant between Kellogg and Link. But it is generally true in cases of assumption clauses in deeds, that the covenant is in form between the grantee and grantor only; but where the grantor is bound for the mortgage debt, then equity treats it as a covenant of indemnity to the grantor and the grantee as a surety for the grantor against his liability for the debt, of which relation the creditor may avail himself under the general principle adverted to. This beneficent principle prevents unnecessary litigation and appropriates the security to reinforce the original obligation according to manifest justice and equity.

It is urged that the fact that Kellogg's liability was not created by his deed from the mortgagors, but by a subsequent and independent transaction between him and the plaintiff, renders the doctrine of *Halsey v. Reed*, 9 Pai. 446, and the cases following it, inapplicable. It is true that most of the cases in which the principle has been applied in our courts have been cases in which the covenant to assume and pay the mortgage was contained in the deed conveying the premises. But the principle that the creditor may avail himself of the covenant does not rest upon the fact that it was contained in or was cotemporaneous with the conveyance of the land. The point to be determined in each case was, whether the grantor in the deed had incurred a personal liability to pay the debt. If he had, it was wholly immaterial whether the liability was created by a covenant in his deed, or by an independent writing. It was necessary to establish his liability in some way, for, if he was under no liability, the covenant of his grantee did not place the latter in the position of surety for the grantor, and the grantor being under no liability to the creditor the covenant could not inure to his benefit. The deeds in those cases were only important because they contained the personal covenant necessary to create the liability. But a bond or other creditor who has no security by mortgage, but only the personal liability of the obligor or principal debtor, may, for the same reason as in mortgage cases, avail himself of an indemnity held by the obligor or original debtor from a third person against his liability. So, also, the fact that Kellogg assumed no liability to his grantors for the

mortgage debt, or otherwise by any agreement with them, is immaterial. He incurred a liability by his bond to the plaintiff, subsequently given, and when he conveyed to Link he imposed upon him the primary duty to discharge that obligation as a part consideration for the conveyance. The case of *Turk v. Ridge*, 41 N. Y. 201, is not applicable. There the bond was given by the grantee to the grantor, and the case turned on the construction of the covenant, and it was held that it was not a covenant to pay the note of the grantor held by the plaintiff. The covenant of Link in this case was to pay the mortgage, and no question of construction arises.

It is urged that the bond of Kellogg to the plaintiff was improperly allowed to be proved, because the giving of the bond was not alleged in the complaint. The complaint alleged that on the conveyance from the mortgagors to Kellogg,

"Kellogg orally agreed with the said Sullys to assume, and did assume the payment of the mortgage . . . and thereby *and otherwise* became legally and equitably bound to the grantors and to the mortgagee to pay the same."

We think this allegation was sufficient, in the absence of any application on the part of the defendant Link to make it more definite, to justify proof of the bond, even assuming that any allegation on that subject was necessary to permit such proof.

We think the point that the defendant was or may have been prejudiced by the omission to serve process on Baker and Schermerhorn, named as defendants in the action, is unfounded. The judgment recited that all the defendants shown by the record to have had an interest in the mortgaged premises were served with process. The judgment of sale was entered upon the motion of Link's attorneys, the attorneys for the plaintiff opposing. Neither Baker nor Schermerhorn had any interest in the mortgaged premises. They were subsequent grantees, but their deeds were not on record and they subsequently and before the commencement of the action, conveyed to other parties. In fact all the necessary parties were joined as defendants and served with process, and a good title would be acquired by a purchaser under the judgment. The joining of Baker and Schermerhorn as defendants was unnecessary, as they had no interest in the premises. The formal and usual allegations in the complaint that the defendants therein have or claim some interest in the premises, subject to the mortgage, is followed in a subsequent clause by a statement that Link had conveyed to Baker and Schermerhorn and they to another person who had conveyed to the defendant Van Allen, thereby fairly defining their relation to the property. The supposition that in bidding on the sale bidders were influenced by any notion that Baker and Schermerhorn had interests which had not been cut off by the judgment, has no support in the proof. If such was the fact the remedy by the defendant was to apply to the court, after his liability had been adjudged, to open the sale.

His attorney was present and bid at the sale, and the judgment of sale, as has been said, was entered upon his motion.

We see no error in the judgment, and it should, therefore, be affirmed.
All concur.

*Judgment affirmed.*¹

THE MARBLE SAVINGS BANK v. MESARVEY ET AL.

SUPREME COURT OF IOWA, FEBRUARY 10, 1897.

[101 Iowa 285.]

This is an action in equity for a judgment on a note, and for the foreclosure of a mortgage securing it upon certain real estate.

The note was executed by the defendant, W. D. Mesarvey, to the Lewis Investment Company for \$2,500, dated September 15, 1888, and due five years thereafter. The mortgage was executed by said Mesar-

¹ When this case was first before the New York Court of Appeals, in 1892, *Wager v. Link*, 134 N. Y. 122, BRADLEY, J., delivering the opinion that Link was chargeable for any deficiency that might arise from the foreclosure and sale, remarked as follows:

"When the defendant took from Kellogg the conveyance of the property and assumed the payment of the mortgage debt, for which he reserved an equivalent portion of the consideration, his obligation as between him and his grantor was primary so far as the latter was personally liable for it. This as it was may be regarded as indemnity to him for the obligation he had voluntarily assumed in respect to the debt, and to that extent as between them they had the relation of principal and surety, and for the purpose of relief founded upon the doctrine of equitable subrogation they may be so treated by the plaintiff. (*Halsey v. Reed*, 9 Paige, 446.) And within that principle the defendant was chargeable with the deficiency and for such purpose was properly made a party defendant in this action.

"The action as against the defendant may, we think, be maintained on the broader ground that his promise was made to Kellogg for the benefit of the plaintiff, and had the requisite consideration for its support. There was no qualification of the liability assumed by him, making it dependent upon any condition. His grantor placed in his hands a fund treated equal to the amount of the mortgage debt, and upon that consideration the assumption appearing by the terms of the deed was made, and by it the defendant agreed to pay the mortgage 'held and owned' by the plaintiff. This appears to have been, and it was, a promise made by the defendant to Kellogg for the benefit of the plaintiff. It was made upon a consideration by which he was equipped with a fund for the purpose, and its performance would discharge his grantor from a personal obligation assumed by him to the plaintiff. This would seem to bring the defendant's undertaking or promise thus made within the principle requisite to the support of the liability of the defendant to the plaintiff. (*Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 id. 178; *Thorp v. Keokuk Coal Co.*, 43 id. 253; *Schley v. Fryer*, 100 id. 71.)

"It would have been otherwise if the title to the land had not passed to the defendant. But as it did, the obligation of the grantor in respect to the mortgage debt as between them became that of the defendant, his grantee. (*Pardee v. Treat*, 82 N. Y. 385.)

"The suggestion that the defendant did not intend that his covenant should inure to the benefit of the plaintiff, because when made he was not advised of the bond of Kellogg to the plaintiff, may be met by the fact that his undertaking was to pay the mortgage of which the plaintiff was represented as the holder and owner, and it was broad enough to embrace the entire amount, in the event the liability of his grantor had been such as to make the covenant essentially necessary for that purpose.

"The conclusion is that the defendant was chargeable in the action for any deficiency that might arise from the foreclosure and sale."

vey and wife upon a certain tract of ground in the city of Des Moines, Iowa. The note and mortgage were transferred to the plaintiff by the Lewis Investment Company. On May 2, 1893, the defendants and appellants, Neeb and Keefner, purchased the real estate described in the mortgage, and, as a part of the consideration or purchase price of said property, assumed and agreed to pay said mortgage; said obligation being embraced in the deed to them from one S. S. Smith and wife, and being in these words, viz.:

"Subject to a mortgage of two thousand five hundred dollars, given to the Lewis Investment Company, which the grantee herein assumes the payment of."

Personal judgment was asked against Neeb and Keefner, also a decree of foreclosure of the mortgage. The defendants filed no answer and made no appearance. On the trial the plaintiff introduced its note and mortgage in evidence, also the warranty deed, from Smith and wife to these defendants and appellants, which contained the clause above mentioned. A personal judgment was rendered against Neeb and Keefner, and a decree of foreclosure was entered as against them and other defendants. Thereafter Neeb and Keefner appealed from said judgment and decree.

Berryhill & Henry, for appellants.

Lewis & Royal, for appellee.

KINNE, C. J.—I. There is a contention as to the right of appellants to have the question raised considered. As we have arrived at the conclusion that upon the merits, the case should be affirmed, we do not consider the point made, but treat the question as properly before us for determination.

II. If the evidence showed that appellants' grantor had purchased the real estate upon which the mortgage rests, which is foreclosed in this case, from the mortgagor, under an obligation to pay the mortgage debt, or if it appeared that all intervening purchasers of said premises had assumed and agreed to pay the mortgage debt, appellants, we take it, would not question the right of appellee to recover a personal judgment against them upon their agreement to pay this mortgage. The controversy arises over the fact that it is not shown that intervening purchasers of the land had assumed the payment of the debt, nor that appellant's grantor was in any way obligated to discharge said indebtedness. No case decided by this court is called to our attention, wherein the facts involved were like those in the case at bar.

A somewhat extended examination of the decisions in other jurisdictions, as well as an investigation of the law as laid down by leading authors, reveals the fact that there is much disagreement as to the grounds upon which one who is not primarily liable to pay the mortgage debt but purchases the mortgaged premises, and agrees to discharge said debt, is held liable. In some cases it is held that the contract to pay the mortgage, operates as a collateral security, obtained by the

mortgagor, which by the subrogation inures to the benefit of the mortgagee. And so it has been held that the mortgagee can recover a personal judgment only against the person who agreed to pay the debt, when the mortgagor holds an obligation which will support the judgment.¹ In some states, and we think in most of them, it is held that the one assuming payment of the debt is liable upon the broad principle that a promise of one person to another for the benefit of a third person may be enforced by the latter.² This is the recognized doctrine in this state. *Gilbert v. Sanderson*, 56 Iowa, 352 (9 N. W. Rep. 293); *Ross v. Kennison*, 38 Iowa, 396, and cases cited.

It is held, however, in some of the states adhering to the rule last stated, that there can be no recovery in such a case unless the grantor is personally liable upon the mortgage which his grantee assumed to pay. Hence it is said that "such a covenant, made by one to whom the premises are conveyed, after several conveyances have intervened since the conveyance by the mortgagor, can not be enforced by the holder of the mortgage, unless the grantor in whose deed payment was assumed, had himself assumed the payment of the mortgage debt, or made himself personally liable for it in some way."³ This is the rule contended for by appellants in this case. It is therefore simply a question whether the obligation assumed by one who purchases the mortgaged premises, and agrees to pay the mortgage debt, shall be held to be available to the mortgagee or his assignee in all cases, or only in cases where the purchaser's immediate grantor was personally liable for the payment of the debt. The latter is the rule in New York and some other states. Upon principle we discover no reason for limiting the application of the rule to recovery in cases wherein the immediate grantor is personally liable to the mortgagee or his assignee.

The theory upon which personal liability to a third person not a party immediately to the contract, is based, is that one may lawfully agree with another to pay a third person, and that in such a case no consideration need pass to such third person, nor need he even know of the arrangement. The consideration for this land, in part was the discharge, or payment of this mortgage, by the purchasers. As between the purchasers and their grantor there can be no question that such grantors could enforce the contract. Now, surely, such grantors have the right, if they wish, to direct the application of the purchase money; and it is therefore a matter of no concern to such a purchaser, who agrees to pay the mortgage debt, as to whether his grantor is personally liable to pay said debt. We discover no reason for limiting recovery to a case

¹ Citing, 1 Jones, Mortg., section 761a.

² Citing, 1 Jones, Mortg., section 758; 3 Pomeroy, Eq. Jur., section 1207; 1 Beach, Mod. Law Cont., sections 196-200, and notes.

³ Citing, 1 Jones, Mortg., section 760; 1 Beach, Mod. Law Cont., secs. 200-202, and notes.

where the purchaser's immediate grantor is under a personal obligation to pay the mortgage debt. We think the decree was correct.

*Affirmed.*¹

1 "Where a party, purchaser of lands, agrees as a part of the contract of purchase to assume and pay a mortgage debt existing against the lands, the promise so to do is for the benefit of the owner and holder of the debt and may be enforced by such party. The purchase price of the lands is the consideration moving between the purchaser and his grantor, and it is immaterial and of no consequence to the grantee that his grantor may or may not be personally liable or bound for the payment of the mortgage debt, and by such promise the promisor becomes personally liable to the mortgagee, or assigns, for the mortgage debt, regardless of whether his grantor was so liable or not. (Merriman v. Moore, 90 Pa. St., 78; Dean v. Walker, 107 Ill., 540; Bay v. Williams, 1 N. E. Rep. [Ill.], 340.)"—Per HARRISON, J., in *Hare v. Murphy*, (1895) 45 Neb. 809, 813.

Contra (and in accord with *Vrooman v. Turner*, ante): *Hicks v. Hamilton* (1898), 144 Mo. 495 [P. held a note secured by a deed of trust upon land belonging to M., the maker of the note. M. conveyed the land subject to this deed of trust to one Cowling, but without any assumption by him of the debt. Cowling subsequently transferred the land by warranty deed to D. This deed contained a clause stating that *the grantee therein "assumes and agrees to pay"* the debt. After this conveyance the property was sold under the deed of trust. The proceeds did not satisfy P.'s note. He sought to recover the deficiency from D., on the ground that the latter, by accepting the deed from Cowling, had assumed and agreed to pay the debt.] Said the court: "The agreement between the promisor and the promisee must possess the necessary elements to make it a binding obligation—in other words, it must be a valid contract between the parties to enable a third person, for whose benefit the promise is made, to sue upon it. A mere naked promise from one to another for the benefit of a third will not sustain an action. Cowling, defendant's grantor, did not owe the mortgage debt and had never assumed to pay it. Defendant's promise was not, therefore, to *indemnify him*. . . . The assumption was therefore without semblance of a consideration passing from Cowling to the defendant. . . .

"The liability of a grantee of real estate, who had assumed the payment of a mortgage debt upon it, is sometimes placed upon the doctrine of subrogation. The mortgagee is declared to be entitled to enforce for his benefit 'all collateral obligations for the payment of the debt, which a person standing in the situation of a surety has received for his benefit.' As between the parties to the deed, the grantor becomes the surety, and the grantee the principal debtor. Of course no such rule could obtain where the grantor was not, and had never become, bound for the debt.

"If plaintiff is to rest his case upon the proposition that he can recover upon the promise of defendant to Cowling as made for his benefit, he is met by the objection that Cowling was in no manner indebted to or connected with plaintiff, and bore no such relation to him as would give Cowling any interest in having the assumption clause inserted in the deed."—Per WILLIAMS, J., p. 498, 499. And *Heim v. Vogel* (1879), 69 Mo. 529, is distinguished on the ground that the attention of the court in that case was not directed "to the difference between the liability of a grantee of mortgaged premises upon a clause in his deed assuming the mortgage debt when his grantor was bound therefor; and such liability when there was no obligation to pay upon the part of the grantor."

See also, *Harberg v. Arnold* (1899), 78 Mo. App. 237: [Action to charge a defendant with the payment of a promissory note which, it was claimed, he had assumed and agreed to pay.] Said the court: "The note in question was given for a part of the purchase price of certain real estate and was secured by a deed of trust on the realty conveyed. The property was sold from [one] to another until finally it was conveyed to one T. C. Alexander. In the deed to Alexander, there was no clause whereby he did or was to assume the note. Alexander then sold and conveyed to the defendant, in which deed it was recited that the defendant assumed and agreed to pay the note in controversy. Plaintiff's intestate is the holder of the note by successive indorsements from the original holder, and he relies, to sustain this action, on the ground that the promise made by defendant to Alexander in accepting the deed aforesaid inures to the benefit of the intestate.

"The rule as now seems to be settled in this state is that while an action may be maintained by a third party on the promise of one to another for the benefit of such third party, yet there must be a debt or duty owing by the promisee to the third party. *Insurance Co. v. Trenton*, 42 Mo. App. 118; *Howsmon v. Trenton*, 119 Mo. 304 [given in text, *infra*]; *St. Louis*

JEFFERSON v. ASCH.

SUPREME COURT OF MINNESOTA, JUNE, 1893.

[53 *Minn.* 446.]

Appeal by plaintiffs, Rufus C. Jefferson and James Kasson, from an order of the District Court of Ramsey County, sustaining a demurrer to their complaint.

The case is sufficiently stated by the court.

Owen Morris, for appellants.

F. W. Zollman, for respondent.¹

GILFILLAN, C. J.—The Boston Northwest Real-Estate Company owned a lot on Sixth Street, St. Paul, with two buildings standing on it, and let it to George Benz for the term of five years from May 1, 1889, and about three years thereafter he sublet it for the remainder of his term to Smith & Co. Afterwards Smith & Co. entered into a contract with the defendant Leithauser to make certain repairs and the defendants Leithauser, as principal, and Asch and Boldthen, as sureties, executed a bond in which they acknowledge themselves to be indebted to George Benz, "for the use of the Boston Northwest Real-Estate Company," "and all persons who may do work or furnish material" pursuant to said contract, "to be paid to said George Benz, his executors, administrators, or assigns for the said use," and which was conditioned to be void if Leithauser should pay "all just claims for all work done and to be done and all materials furnished and to be furnished pursuant to said contract and in the execution of the work therein provided for, as they shall become due, and shall indemnify and save harmless said George Benz and said Boston Northwest Real-Estate Company from all mechanics' liens," etc., and "indemnify and save harmless the said George Benz from all claims of whatever description which may arise from, in, or about said work, alterations, and repairs."

v. Von Phul, 133 Mo. 561; *Hicks v. Hamilton*, 144 Mo. 495; *Devers v. Howard*, 144 Mo. 671 [given in text, *infra*]; *Street v. Goodale, Barger & Co.*, 77 Mo. App. 318.

"In the case before us Alexander is the promisee, defendant having made the promise to him. But Alexander had not assumed the payment of the note in the deed conveying to him the property. He was under no obligation, legal or equitable, to pay the note to the holder, this plaintiff's intestate. So, therefore, under the rule aforesaid, the plaintiff can not recover. But it is urged upon our attention that defendant's agreement to pay the note in controversy was a part of the purchase price of the land he bought of Alexander, and that if he prevails in this action he gets the land without paying the price. This was no concern of plaintiff's intestate. The promise was not made to her, and she can not come into a controversy exclusively between others. The obligation was with Alexander, not with her, and he did not owe her anything. It was necessary, as we have seen, in order to establish such a privity as would let her claim the promise to another that that other should have owed her something. The judgment will be affirmed. All concur."—*PER ELLISON*, p. 239.

¹ The reporter's statement and the arguments are omitted.

The plaintiffs, having furnished materials to the contractor for the purposes of the contract, bring this action on the bond to recover the price thereof.

The court below sustained a demurrer to the complaint.

From the seals to this bond there arises the presumption of a sufficient consideration to sustain it between the parties to it.

The cases in which one not a party to a contract may sue upon a promise in it for his benefit were at one time limited to contracts not under seal, and this court, in stating the law on the subject, in *Follansbee v. Johnson*, 28 Minn. 311 (9 N. W. Rep. 882), expressed that limitation; but the distinction in this respect between contracts by specialty and simple contracts has not in the later authorities been adhered to, and may now be regarded as abandoned. If there ever was any reason for the distinction, it could only have been a technical one, which no longer has any merit to commend it, and we do not think we ought to recognize it.

Though this seems intended as a mere bond to indemnify and save harmless the obligee named in it, that, and not any incidental benefit that might accrue to others not parties to it, being the primary purpose of its stipulations and promises, we will treat it, because on both sides it is so presented here, as though such primary purpose were to secure payment to the persons doing work or furnishing material under the contract mentioned in it.

In considering the question presented we must lay aside, as having no bearing upon it, the cases of official or statutory bonds required or authorized for the benefit or security of persons not named as obligee, a nominal obligee being named, and where the statute expressly or by implication authorizes such persons to sue upon them. Instances of such are sheriff's bonds, probate bonds, bonds authorized by the mechanics' lien law in 1878, G. S. ch. 90, and such as were considered in *City of St. Paul v. Butler*, 30 Minn. 459 (16 N. W. Rep. 362), and *Morton v. Power*, 33 Minn. 521 (24 N. W. Rep. 194).

As, so far as appears by the complaint, Benz could not be liable to pay for the work done and materials furnished in fulfilling the contract to repair, and as, under the law then in force, his interest in the property could not be subject to a lien therefor, it was legally a matter of indifference to him whether the work and materials were paid for or not. He had no duty in respect to it. And the question comes to this: Where, in a contract between two persons one promises the other to do something for the benefit of a stranger to the contract, and the promisee has no relation to the thing to be done nor to the stranger to be benefited, can such stranger bring an action to enforce the promise?

In some of the text-books and decisions it is stated generally "that, where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it." But we do not think there is a case to be found in which such an action was

sustained upon the bare promise, with no other circumstances to justify an exception to the general rule that an action upon contract can be maintained only where there is privity of contract between the parties.

In *Lawrence v. Fox*, 20 N. Y. 268—the most conspicuous and most thoroughly reasoned case in New York, sustaining an action by a stranger to a contract,—the promisee owed the debt which the promisor agreed to pay, and loaned him the money, which he agreed to pay to the promisee's creditor. *Thorpe v. Keokuk Coal Co.*, 48 N. Y. 253, was a case where the grantee in a conveyance of real estate assumed to pay a mortgage resting upon it to secure a debt of the grantor. In the syllabus to the case it is stated that it overrules *King v. Whitely*, 10 Paige, 465, but, as we read the opinion, it goes no further than to question the reason given by the chancellor in the latter case for sustaining an action in such a case when it can be sustained. The case in 10 Paige was one where the grantee in a conveyance assumed to pay a mortgage on real estate for which the grantor was not personally liable. It was held that the creditor could not recover of the grantee. The chancellor stated as the principle upon which a creditor can recover from a grantee so assuming to pay a debt of the grantor that a creditor is entitled to be subrogated to securities for the debts held by a surety, and that between the grantor and the grantee in such case the latter becomes the principal debtor and the former surety. Another and simpler reason might have been given, to-wit, that where one delivers to or leaves in the hands of another a fund with which to satisfy an obligation of the former, a duty in the nature of a trust is thereby created. The decision in 10 Paige was followed in *Trotter v. Hughes*, 12 N. Y. 74, and approved in *Garnsey v. Rogers*, 47 N. Y. 233.

In *Vrooman v. Turner*, 69 N. Y. 280, similar in its facts to the case in 10 Paige, the court go over the whole ground, recognize the decision in *Lawrence v. Fox*, *supra*, and hold the two decisions consistent, and follow that in 10 Paige. It lays down this rule: "To give a third party, who may derive a benefit from the performance of the promise an action, there must be—*First*, an intent by the promisee to secure some benefit to the third party; and, *second*, some privity between the two,—the promisee and the party to be benefited,—and some obligation or duty from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally." "There must be either a new consideration, or some prior right or claim against one of the contracting parties, by which he has legal interest in the performance of the agreement;" and "there must be some legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit."

In some cases, near relationship, as of father and daughter, or uncle and nephew, has been held to supply the place of a strictly legal right

in the third party. *Dutton v. Pool*, 1 Vent. 318; *Felton v. Dickinson*, 10 Mass 287, are instances of such. To enforce such a promise in favor of a third party, where there is no obligation to benefit him on the part of the promisor or promisee, nor anything such as near relationship, nor any consideration from the third party, would be much like enforcing an intended gift or gratuity. *Vrooman v. Turner* settled the law in New York, as the decision, subsequently referred to with approval,¹ has never since been questioned.

The question was considered and the cases in Massachusetts summed up in an able and exhaustive opinion by METCALF, J., in *Mellen v. Whipple*, 1 Gray, 317. That was the case of an agreement by a grantee of real estate to pay a mortgage for which the grantor was not personally liable. It was held the creditor could not recover from the grantee. The court attempts to classify the cases in that state in which one not a party to the promise has been permitted to sue upon it. The classification may be briefly stated as—*First*, cases where the defendant has in his hands money which in equity and good conscience belongs to the plaintiff,—as, if A. put money or property in the hands of B. as a fund from which A.'s creditors are to be paid, and B. has promised expressly or impliedly to pay such creditors; *second*, cases where a near relationship, as father and child or uncle and nephew, exists between the promisee and the person to be benefited; *third*, the cases of which *Brewer v. Dyer*, 7 Cush. 337, is an instance, in which the defendant agreed with a lessee of premises to take the lease and pay the rent to the lessor, and entered with the knowledge of the lessor, paid him the rent for a year, and then left before the term expired.

We have referred so fully to the decisions in New York and Massachusetts because in those states the question has more frequently arisen, and been more ably and thoroughly discussed, than elsewhere in this country.

There has been no decision of this court at variance with the rule as held in those two states. In every case but one the promise was to pay a debt of the promisee, and a fund was either left or put in the hands of the promisor for the purpose. That one case was decided in a line with the rule held in the *Vrooman* and *Mellen* cases. A grantee of real estate had assumed a mortgage debt for which the grantor was not personally liable. It was held the creditor could not recover from the grantee. *Brown v. Stillman*, 43 Minn. 126 (45 N. W. Rep. 2).

Without undertaking to lay down a general rule defining when a stranger to a promise between others may sue to enforce it, we are prepared to say that, where there is nothing but the promise, on con-

¹ Referring to *Wilbur v. Warren*, 104 N. Y. 193, (10 N. E. Rep. 263); *Litchfield v. Flint*, 104 N. Y. 543, (11 N. E. Rep. 58); *Comley v. Dazian*, 114 N. Y. 161, (21 N. E. Rep. 135); *Lorillard v. Clyde*, 122 N. Y. 498, (25 N. E. Rep. 917); *Durnherr v. Rau*, 135 N. Y. 219, (32 N. E. Rep. 49).

sideration from such stranger, and no duty or obligation to him on the part of the promisee, he can not sue upon it.

Such is this case.

Order affirmed.

VANDERBURGH, J., took no part in the decision.¹

HOWSMON v. TRENTON WATER COMPANY.

SUPREME COURT OF MISSOURI, DECEMBER 23, 1893.

[119 Mo. 304.]

Appeal from Grundy Circuit Court.

Harber & Knight and *A. W. Mullins*, for appellant.

R. L. Yeager, for respondent.²

BRACE, J.—This is an appeal from the judgment of the circuit court of Grundy county, sustaining a demurrer to the plaintiff's petition, the material allegations of which are in substance as follows:

¹ In *Union Ry. Storage Co. v. McDermott* (1893), 53 Minn. 407, the principle of *Jefferson v. Asch* was applied to the following facts:

The defendant McDermott entered into a written contract with the United States, an assistant quarter master of the army making the contract in behalf of the government, by the terms of which McDermott undertook to erect certain buildings for the government at Ft. Snelling, he to furnish the material and labor therefor. It was specifically expressed by article three of the contract that he should "be responsible for and pay all liabilities incurred for labor and material in fulfillment of this contract." In article six it was agreed that "all rights of action however, for any breach of this contract by the said John R. McDermott are reserved to the United States."

In connection with the making of this contract McDermott as principal, and other defendants as his sureties, executed their bond to the United States in the penal sum of \$5,000, conditioned that McDermott should perform all the covenants, conditions, and agreements contained in the contract, to which the bond specifically referred, "including the covenant that the said John R. McDermott shall be responsible for and pay all liabilities incurred for labor and material in fulfillment of said contract."

The plaintiff, in reliance upon the terms and conditions of the contract and bond, furnished to McDermott at an agreed price a large quantity of brick, which was used in the construction of the buildings, but for which payment was never made. The plaintiff sought to recover in an action on the bond. A demurrer to the complaint was sustained below and the plaintiff appealed. Said the Supreme Court, per DICKINSON, J.: "The legal question here presented—as to the right of the plaintiff, a stranger to the contract, to sue upon it—has recently been considered in *Jefferson v. Asch*, *post*, p. 446, (55 N. W. Rep. 604,) and the rule here declared is decisive of this case. The plaintiff has no right of action on the bond. He was a complete stranger to it. There was no privity between him and the promisee,—the United States. The latter rested under no duty or obligation to him upon which he could assert any legal or equitable right to avail himself of the benefit of, and enforce, the promise made by the defendants to the United States. Nor was the promisee—the United States—interested in having this part of the contract performed. It would be no benefit to the United States if the contractor should pay his own debts for material purchased by him. It would be in no way prejudiced if he should not pay. Its property could not be subjected to a lien therefor. In brief, the right of the plaintiff to sue upon this bond has no other legal foundation than the bare fact that the defendants had by that instrument entered into an obligation towards a mere stranger to the plaintiff that his debt should be paid. In such a case the stranger to the contract can not sue upon it. Our decision above cited is decisive."

² The arguments are omitted.

That the plaintiff is a resident, citizen, and taxpayer of the town of Trenton in said county and the owner of a large amount of valuable property within the corporate limits of said town, subject to taxation for ordinary purposes, and to a special tax of five mills on the dollar annually for the purpose of discharging the obligations of said town to the defendant on the contract sued on herein, all of which he has regularly and promptly paid.

That by a contract entered into, by ordinances, between the town of Trenton and the defendant, the said defendant (in consideration of the franchise granted it, and the privilege of collecting certain water rates from its citizens, and of the sum of \$2,000, to be paid annually by the town, to be raised by an annual tax of five mills as aforesaid, all of which the defendant has received and enjoyed) promised and agreed with said town to furnish at all times an adequate supply of good, clear, and wholesome water, for fire and other purposes for public and private use, under such a pressure as to have the power to throw at all times six streams of water through fifty feet of two and one-half inch rubber hose and one inch ring nozzle eighty feet high in the business portion of the town, and to throw at least two effective streams at any one time, in any other part of the town accessible from the mains; and further agreed, that

"should said water company from lack of water supply, or any other cause except providential or unavoidable accident, fail to furnish a reasonable or adequate supply of water to extinguish any fire, then it shall be liable for all damages occasioned by such fire or neglect."

That on the twenty-fourth of March, 1889, plaintiff's dwelling house in said town, with the household and kitchen furniture and wearing apparel therein contained, all of the value of \$3,700, was destroyed by fire, that said house was close to the main of defendant, and situated at a place where, in the event a fire should occur there, it was the duty of defendant under said contract to furnish an adequate supply of water with force and power sufficient to extinguish such fire; which the defendant, without any providential or unavoidable accident, failed to do, and by reason of such failure plaintiff's property was destroyed, to his damage in the sum of \$3,700.

1. It is well established law in this state, by a line of decisions extending from the year 1847 to the present date, "that a person for whose benefit an express promise is made in a valid contract between others may maintain an action upon it in his own name."¹ And such is now the prevailing doctrine in America, by the great weight of authority. 3 Am. & Eng. Encyclopedia of Law, p. 863, note 5. This

¹ *Citing*, *Ellis v. Harrison*, 104 Mo. 270; *State ex rel. v. Gas Light Co.*, 102 Mo. 472; *Fitzgerald v. Barker*, 70 Mo. 685; *Rogers v. Gosnell*, 58 Mo. 589; *Rogers v. Gosnell*, 51 Mo. 466; *Meyer v. Lowell*, 44 Mo. 328; *Robbins v. Ayres*, 10 Mo. 539; *Bank v. Benoist*, 10 Mo. 521.

doctrine, originally an exception to the rule that no claim can be sued upon contractually unless it is a contract between the parties to the suit, has become so general and so far reaching in its consequences, as to have ceased to be simply an exception, but is recognized, within certain limitations, as an affirmative rule.

The foregoing cases from this court, are in harmony with the rule as laid down in *Lawrence v. Fox*, 20 N. Y. 268, "that an action lies on a promise made by the defendant, upon valid consideration to a third party, . . . although the plaintiff was not privy to the consideration and that such promise is to be deemed made to the plaintiff if adopted by him, though he was not a party to, or cognizant of, it when made." *Meyer v. Lowell*, 44 Mo. 328.

"It is not every promise [however] made by one to another, from the performance of which a benefit may ensue to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit, as its object, and he must be the party intended to be benefited."¹ In other words, the rule is not so far extended as to give a third person, who is only indirectly and incidentally benefited by the contract, a right to sue upon it." But "the name of the person to be benefited by the contract need not be given, if he is otherwise sufficiently described or designated. Indeed, he may be one of a class of persons, if the class is sufficiently described or designated." *Burton v. Larkin*, 36 Kan. 246; *Johannes v. Ins. Co.*, 66 Wis. 50.

In the opinion delivered by ALLEN, J., in *Vrooman v. Turner*, (1877), 69 N. Y. 280, it was said: "Judges have differed as to the principle upon which *Lawrence v. Fox* and kindred cases rest, but in every case in which an action has been sustained there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise. Whether the decisions rest upon the doctrine of agency, the promisee being regarded as the agent of the third party, who, by bringing his action adopts his acts, or upon the doctrine of a trust, the promisor being regarded as having received money or other thing for the third party, is not material. In either case there must be a legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit."

An examination of very many cases decided before and since it was so held in that case, satisfies us that the rule has been confined to such cases in this state as well as elsewhere, and upon that principle, when this case was before the Kansas City court of appeals, in an action by another party, (*Insurance Company v. Trenton Water Co.*, 42 Mo. App. 118), it was, in effect, held that the plaintiff had no cause of action against the Water Company, because the town of Trenton was under

¹ Citing, *Simson v. Brown*, 68 N. Y. 355; *Vrooman v. Turner*, 69 N. Y. 280; *Wright v. Terry*, 23 Flor. 160; *Austin v. Seligman*, 18 Fed. Rep. 519; *Burton v. Larkin*, 36 Kan. 246, and cases cited.

no obligation to the plaintiff to furnish an adequate supply of water and power, to extinguish the fire by which the premises were consumed. And in support of its position the following additional cases were cited: *Davis v. Water Works Co.*, 54 Iowa, 59; *Nickerson v. Hydraulic Co.*, 46 Conn. 24; *Ferris v. Water Co.*, 16 Nev. 44; *Fowler v. Water Co.*, 83 Ga. 219; and *Atkinson v. Waterworks Co.*, 2 L. R. Exch. Div. 441.

The last of these cases is not in point since the action in that case was for the breach of a public statutory duty and the court held that the action would not lie, because the statute gave no right of action to the plaintiff. The cause of the action in each of the other cases was for a breach of duty which it was alleged the defendants owed the plaintiff under a contract with the city, to which the plaintiff was not a party, whereby they agreed to furnish an adequate supply of water and power to extinguish fires in the town or city. To this it was replied in the Connecticut case (decided in 1878): "Whatever benefit the plaintiffs could have derived from the water would have come from the city through its fire department. The most that can be said is, that the defendants were under obligations to the city to supply the hydrants with water. The city owed a public duty to the plaintiffs to extinguish their fire. The hydrants were not supplied with water, and so the city was unable to perform its duty. We think it clear that there was no contract relation between the defendants and the plaintiffs, and consequently no duty which can be the basis of a legal claim."

In the Iowa case [*Davis v. Water Works Company*], decided in 1880, it was replied: "The city, in exercise of its lawful authority, to protect the property of the people, may cause water to be supplied for extinguishing fires and for other objects demanded by the wants of the people. In the exercise of this authority it contracts with defendant to supply the water demanded for these purposes. . . . It can not be claimed that the agents or officers of the city employed by the municipal government to supply water, improve the streets, or maintain good order, are liable to a citizen for loss or damage sustained by reason of the failure to perform their duties and obligations in this respect. They are employed by the city and responsible alone to the city. The people must trust to the municipal government to enforce the discharge of duties and obligations by the officers, and agents of that government."

In the Nevada case [*Ferris v. Water Company*], decided in 1881, after citing *Vrooman v. Turner*, *supra*, with approval and quoting therefrom, it was replied: "The board of trustees of the town, in the exercise of a discretionary power conferred upon them by the legislature, contracted for a supply of water for the extinguishment of fires. The plaintiff, in common with the other residents of the town, enjoyed the advantages of this contract. He had an indirect interest in the

performance of the contract by the Water Company, as had all of the property holders of the town, but such an interest is not sufficient to constitute the privity, either directly or by substitution, which must exist in order to give him a right of action upon the contract."

In the Georgia case, decided in 1889, in an opinion by BLECKLEY, C. J., it was replied: "The present case is not based upon the breach of a statutory duty, but solely upon failure to comply with a contract made with the municipal government of Athens. To that contract the plaintiff was no party, and the action must fail for the want of requisite privity between the parties before the court. . . . There being no ground for recovery, treating the action as one *ex contractu*, is it better founded treating it as one *ex delicto*? We think not. The violation of a contract entered into with the public, the breach being made by mere omission or non-feasance, is no tort, direct or indirect, to the private property of an individual, though he be a member of the community and a tax payer to the government. Unless made so by the statute, a city is not liable for failing to protect the inhabitants against the destruction of property by fire. *Wright v. Augusta*, 78 Ga. 241; 7 Am. and Eng. Encyclopedia of Law, p. 997, *et seq.*"

The case in hand is on the contract, made by the water company with the town of Trenton, and the only feature that it presents that can take it out of the principle laid down in these cases is that provision was made in this contract for a special tax to be raised to provide part of the consideration the water company was to, and did, receive, to which the plaintiff contributed, and an express promise contained in the contract that "should said water company from lack of water or any other cause, except providential or unavoidable accident, fail to furnish a reasonable or adequate supply of water to extinguish any fire, then it shall be liable for all damages occasioned by such fire or neglect;" this argument being that here is an express promise of indemnity in a contract in which the plaintiff is privy to the consideration at least.

The argument was met by the supreme court of Iowa, in *Becker v. Waterworks*, 79 Iowa, 419, decided in 1890, probably not published when this question was before the Kansas City court of appeals, in the following manner: *First*. "The chief question raised by the demurrer was considered in *Davis v. Waterworks Co.*, 54 Iowa, 59, and decided adversely to the claim now made by plaintiff. But he contends that this case differs from that in several material particulars. In this case a special fund was raised by the city to pay for a sufficient supply of water for use in case of fires, and to that fund plaintiff contributed. It is said that in making the contract and in levying and collecting the taxes required by its provisions, the city acted as a mere agent. We do not think the fact that the city levies and collects a tax to be paid to defendant creates any privity of interest between defendant and the tax-payers. In making the contract, the city discharged one of the duties for which it was created; and in raising the required money it only

provided the consideration due from it by virtue of the contract. It will hardly be claimed that defendant could proceed against a taxpayer, in the first instance, for any unpaid money due under the contract from the city. . . ."

Second. "It was decided in *Van Horn v. City of Des Moines*, 63 Iowa, 448, that the city was not liable for the failure of the water works company to furnish the water required by its contract to extinguish fires, even though the city had taken a contract from the company to protect it from liability which might arise from malfeasance or neglect on the part of the company. . . . Much stress is placed by appellant upon that part of section 18 which provides 'that said company shall be liable for all injury to persons or property caused by the negligence, mismanagement or fault of itself or its employees while engaged in the construction or operation of said works.' Municipal corporations have and can exercise only such powers as are expressly granted to them by law, and such incidental ones as are necessary to make those powers available, and are essential to effectuate the purposes of the corporation; and those powers are strictly construed. *Clark v. City of Des Moines*, 19 Iowa, 212; *McPherson v. Foster*, 43 Iowa, 57. The law which authorizes cities to contract with individuals and companies for the building and operating of water works confers no power upon a city to make a contract of indemnity for the individual benefit of a taxpayer, for a breach of which he could maintain an action in his own name."

The town of Trenton, under its charter, had power to pass ordinances "to prevent and extinguish fires" (Laws 1856, p. 353), and as incident thereto power to contract for a supply of water for that purpose. But it would seem under the authorities cited, the plaintiff can not maintain this action for cogent reasons, which have and may be put in several ways:

First. Although it was within the power of the town by contract to supply water for the purpose of extinguishing fires, it did not owe the duty of extinguishing fires to plaintiff. *Haller v. Sedalia*, 53 Mo. 159. Consequently the case is not brought within the line of adjudicated cases which maintain an exception to the rule that suit upon a contract must be brought by a party to the contract, in cases where the promisee owed a duty to the third party, which the promisor undertook to perform.

Second. A municipal corporation in making contracts for the benefit of its citizens acts for them collectively, and for all of them in every act, and the relation of privity is not and can not be introduced into such contracts, by reason of taxpaying, or the discharge of any civil duty by any individual citizen.

Third. The benefits to be conferred upon the individual citizen by the contract are incidental to the contract, the primary object of which is the benefit of all the citizens in their corporate capacity.

Fourth. It does not clearly appear that the benefit was intended for the citizens in their individual capacity, but may have been intended for the protection of the municipality, and in the absence of express power in the municipality to make contracts for the indemnity of its individual citizens, should be so construed. *City, ex rel v. O'Connell*, 99 Mo. 357.

Fifth. The relation that the contractor sustained to the town was that of its agent or servant to carry out the obligations of the contract upon its part for the benefit of all the citizens of the municipality. And for the enforcement of the terms thereof the citizens must look to the authorities of the city, and can not individually maintain an action for a breach of the contract.

Sixth. The town had no authority to make a contract to indemnify the plaintiff for the loss of his property by fire resulting from the neglect of its agents or servants to furnish an adequate supply of water to put it out, and therefore could not make such a contract that would be binding on another.

The appellant is, however, not without authority to sustain his position. In a recent case in Kentucky, decided in 1889, the supreme court of that state held that "where a water company has contracted with a city to furnish at all times a supply of water sufficient for the protection of the inhabitants and property of the city against fire the company must answer in damages for loss by fire resulting from its failure or refusal to perform its contract." *Paducah Lumber Company v. Paducah Water Supply Company*, 89 Ky. 340. Authority for this proposition is not therein cited, and the reasoning upon which the position is rested does not seem to us entirely satisfactory.¹

¹In *Paducah Lumber Co. v. Paducah Water Supply Co.* (1889), 89 Ky. 340, the court, per LEWIS, C. J., reasoned as follows:

"Authorities in some of the states hold the general rule to be that the plaintiff in an action on contract must be a person from whom the consideration actually moved, and that a stranger to the consideration can not sue on a contract. But we think if there be, in fact, consideration for a promise or an engagement made for the benefit of the person who sues, it is not essential for it to have passed directly from him to the person sued. It is not, however, important whether this case either comes within what is elsewhere laid down as a general rule, or is an allowable exception to it, for this court has held the doctrine well settled that a party for whose benefit a contract is evidently made may sue thereon in his own name, though the engagement be not directly to or with him. *Smith v. Lewis*, 3 B. M. 229; *Allen v. Thomas*, 3 Met. 198, which practice is not only in accordance with the rule found in Chitty on Pleading, but seems to be required by section 18, Civil Code, that in express terms provides every action must be prosecuted in the name of the real party in interest, except that under section 21 a fiduciary or trustee may bring an action without joining with him the person for whose benefit it is prosecuted.

"It thus follows that if the city of Paducah had power to make the contract as well for the personal benefit of its several inhabitants as for purely municipal purposes, and did so make it, appellant being the real party in interest, became owner of the property destroyed, has the right to prosecute the action in its own name, if maintainable at all, and the city of Paducah, though made so, is not even a necessary party, because whatever interest it may have, or injury it may have sustained, is entirely distinct, if not remote.

"Conceding, as must be done, existence of the alleged power of the city of Paducah under its charter to enter into a contract with another for construction and operation of water-works, the right and also duty attached to make it for the personal benefit of inhabitants

The plaintiff's contention also receives some support from the reasoning of Judge THOMPSON in *Lampert v. Gas Light Company*, 14 Mo. App. 376, according to whose views, it would seem that the contract declared upon here should raise, on the part of the defendant, a public duty to be performed for the benefit of the inhabitants of the town distributively, and for the negligent nonperformance of that duty an action would lie by the town "suing upon the contract, or by an individual specially damaged thereby, proceeding as for the nonperformance of a public duty and setting up the contract by way of inducement."

As before stated, the suit here is upon the contract, and not against the water company for the negligent nonperformance of a public duty, and these views have simply persuasive force. At all events the position of the Kansas City court of appeals, and the ruling of the court below in this case, is sustained by the weight of authority, and the judgment herein will be affirmed. All concur, except BARCLAY, J., absent.

DEVERS v. HOWARD.

SUPREME COURT OF MISSOURI, JUNE 14, 1898.

[144 Mo. 671.]

Transferred from Kansas City Court of Appeals.

J. W. Perry, for appellant.

Sallee & Goodman and *D. J. Heaston*, for respondents.¹

BURGESS, J.—This case was appealed from the circuit court of Harrison county to the Kansas City Court of Appeals, where the judgment

within its corporate limits; for supply of water in a city for domestic and manufacturing purposes, and as safeguard against injury to or destruction of private property by fire, is always in such cases the main inducement, the need of the municipal corporation itself for water supply being comparatively little. Besides, it is manifest the principal source of expected profit to appellee was the money to be collected by imposition of the special taxation, and for private use of water with which to pay for service in supplying it for use of the inhabitants and protection of their property from effects of fire. And it being alleged in the petition, and also in effect provided in the ordinance of the city council that contains the terms and conditions of the contract, that it was made for the benefit of the inhabitants, it seems to us that if the appellee can be made answerable in damages at all, it is liable to appellant upon the facts stated in the petition."

See further, *Sample v. Hale* (1892), 34 Neb. 220. In a contract between one Layne and the State of Nebraska, for the erection of a public building, Layne agreed "to pay and settle in full, with the parties entitled thereto, all accounts and claims that may become due by reason of laborers' and mechanics' wages or for materials furnished or services rendered, so that each and all persons may receive his or their just dues in that behalf." Held, that the state was chargeable with a moral duty to protect the persons who furnished labor and materials for the erection of the building, and that an action by a material man upon the contract between Layne and the state could therefore be maintained. *Knapp v. Swaney* (1885), 56 Mich. 345, approved. Accord also *Fitzgerald v. McClay* (1896), 47 Neb. 816, 818; *King v. Murphy* (1896), 49 Neb. 670; *Rohman v. Geiser* (1898), 53 Neb. 474; *Pickle Marble Co. v. McClay* (1898), 54 Neb. 661. Compare *Baker v. Bryan* (1884), 64 Iowa, 561, 565.—Ed.

¹ The arguments are omitted.

was affirmed, but thereafter the case was certified to this court by the court of appeals, upon the ground that one of the judges of that court was of the opinion that the decision is in conflict with the decision of this court in the case of *St. Louis Public Schools v. Woods*, 77 Mo. 197.

This is an action upon a bond executed by the defendant Howard as principal, and defendants Vandivert and Phillips as his securities, to the city of Bethany, Missouri. On the eighteenth day of June, 1894, Howard entered into a contract with the city of Bethany to dig for it a well on lot 4, block 7 of Blackburn's addition to said city, for the sum of \$800. At the time of the execution of the contract said Howard as principal, and Ashman H. Vandivert and George L. Phillips as securities, executed and delivered to said city their bond in the penal sum of \$1,000, conditioned for the faithful performance of the work by Howard and the payment by him for all labor done on said well, and for all materials furnished for or used on the same. The *conditions and covenants* of the bond as set out in the petition are that, whereas said L. W. Howard had on that day entered into a written contract with said city of Bethany by which he had agreed to dig, wall, and complete said well for said city, for the sum of \$800, the said L. W. Howard to pay for all labor done on said well, and for all material used or furnished for the same, the said well to be dug and walled up and finished according to certain written plans and specifications which were made a part of said contract; and if the said L. W. Howard should dig said well according to his said contract with said city of Bethany, and according to the plans and specifications, and should pay for all labor done on said well, and also pay for all material furnished for or used on the same, and should complete said contract in a good and workmanlike manner by the eighteenth day of July, 1894, then said obligation to be void, otherwise to remain in full force and effect.

The petition then proceeds as follows :

Plaintiff further states that said condition in said bond for the payment for all labor done or material furnished in the construction of said well, was inserted therein in pursuance to the provision of the said written contract between said L. W. Howard and said city of Bethany for the sole and express purpose of protecting all persons who should do work upon or furnish material for the construction of said well, and because it was well known to all of the parties to said bond or writing obligatory that said L. W. Howard was wholly and totally insolvent as hereinbefore alleged.

Plaintiff further states that, relying upon the said provisions in said written contract between said L. W. Howard and said city, and upon the indemnity and protection provided and offered thereby, and relying solely upon the said conditions and terms of said bond or writing obligatory and knowing that said L. W. Howard was insolvent, he did, after the execution of said contract and said bond and during the construction of said well, furnish to said L. W. Howard the following material of the value stated, and which was by him, the said L. W. Howard, used in the construction of said well, to-wit:

139½ Perch of Stone, at \$1 per perch.....	\$139.50
By Cash.....	42.60

Balance due.....	\$90.00;
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that said L. W. Howard has failed and neglected to pay for the same, although often requested so to do, and the whole amount thereof is yet due and unpaid.

Plaintiff further states that after the completion of said well, to-wit, about the 17th day of August, 1894, he presented his bill for the material aforesaid to the proper officers of said city of Bethany, and demanded and requested said city to protect the plaintiff in his said claim, and to deduct the amount thereof from any balance that might be due to said L. W. Howard for constructing said well; that thereupon said city of Bethany was about to exercise the right conferred upon it by said contract to pay said claims for work and material out of the balance claimed by said defendants to be due on said contract, and was about to pay the claim of plaintiff and others who had furnished material for the construction of said well, when the defendants and each of them in his own proper person appeared before the board of aldermen of the said city of Bethany on or about the 17th of August, 1894, and then and there admitted and agreed that they were liable under said condition of said contract and bond for said bills of plaintiff and others who had furnished material for the construction of said well, and that if said city of Bethany would receive and accept said well from them, and would pay to the defendants the sum of one hundred and ninety-six dollars and seventy-five cents, the balance due for constructing said well, they, the said defendants, would immediately pay to this plaintiff and the other persons who had furnished material for the construction of said well, the full amounts of their respective claims; and that the agreement of said city of Bethany to accept said well and to pay said balance claimed by the defendants to be due for the construction thereof was upon the express condition that the defendants would pay said claim of plaintiff and others; that but for said agreement on the part of the defendants L. W. Howard, Ashman H. Vandivert, and Geo. L. Phillips, the said city of Bethany would have then and there paid the claim of plaintiff out of the balance due said L. W. Howard from said city; that plaintiff being fully advised of said arrangement between said city and said defendants, agreed to and acquiesced therein, fully relying on the agreement of the defendants to pay the claim of plaintiff; that immediately after said agreement between said city and the defendants hereinbefore alleged and set forth, and upon the same day, the defendant ratified and reaffirmed the same to this plaintiff, and promised the plaintiff that they would pay his said claim on the following day.

" Plaintiff further states that immediately upon the making of said agreement, on or about said 17th day of August, 1894, between said city and said defendants, and in consummation thereof, said city did accept and receive said well and did pay to the defendants Ashman H. Vandivert and Geo. L. Phillips, at the instance of the defendant L. W. Howard, the sum of \$196.75, but the said defendants Ashman H. Vandivert and Geo. L. Phillips, after procuring the acceptance of said well and the payment of said sum of one hundred and ninety-six dollars and seventy-five cents, as aforesaid, wholly failed and refused to keep their said agreement or to pay to this plaintiff the balance of his said claim or any part thereof.

" Wherefore the plaintiff says that by reason of the facts aforesaid the defendants have become liable to him for the sum of ninety-six dollars and sixty cents,

with interest thereon from the said 17th day of August, 1894, for which, with costs, the plaintiff asks judgment."

Defendants demurred to the petition upon the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was sustained, and plaintiff declining to plead farther, judgment was rendered in favor of the defendants.

Defendants take the position that the plaintiff is not entitled to recover on the bond sued on, nor on the contract referred to in the petition, because not privy to that contract, and for the further reason that the city of Bethany has no authority under its charter to make contracts for the benefit of strangers or third parties.

There are authorities which sustain defendants' position, but the more recent decisions of this court are the other way, and to the effect that a contract between the parties, made upon a valid consideration, may be enforced by a third person, though not named in the contract, where the obligee owes to him some duty legal or equitable which would give him a just claim. In *St. Louis to use v. Von Phul*, 133 Mo. 565, the court said: "That a contract between two parties upon a valid consideration may be enforced by a third party, when entered into for his benefit, is well settled in this state. This is so though such third party be not named in the contract and though he was not privy to the consideration. *Rogers v. Gosnell*, 58 Mo. 590; *State ex rel. v. Gaslight Co.*, 102 Mo. 482; *Ellis v. Harrison*, 104 Mo. 276, and cases cited. It is sufficient in order to create the necessary privity that the promisee owe to the party to be benefited some obligation or duty, legal or equitable, which would give him a just claim."

In that case, the case of *Kansas City, Etc., Co. v. Thompson*, 120 Mo. 221, relied upon by defendants as announcing a reverse doctrine, was expressly overruled, and the case of *Howsman v. Trenton Water Co.*, 119 Mo. 304, and cases cited, also relied upon by defendants, distinguished from the *Von Phul* case and cases of like character, upon the ground that cities are under no legal or moral obligation to their citizens to extinguish fires, and for that reason there is no such privity between them as promisees and citizens as would give the citizen a right of action on the contract.

Kansas City ex rel. v. O'Connell, 99 Mo. 357, is not an authority in support of defendant's position. That was an action for damages for personal injuries in the name of the city against O'Connell on his bond to the city in the nature of a contract containing among other things the following stipulations:

"It is further distinctly agreed that the said party of the first part shall be responsible for all unlawful damages to persons or property from negligence or carelessness, in doing said work, or in not using proper precaution, between commencing and completing the job, by barricades, signals, lights, or otherwise, to prevent injury to persons or property from said work, and the approaches thereto, and shall indemnify the city of Kansas against all losses or claim for

damages, on account of such neglect, or carelessness; and the said party of the first part covenants with said city of Kansas to pay all laborers employed on said work. . . . Said parties of the second part hereby guarantee that said party of the first part will well and truly perform the covenants hereinbefore contained, to pay all laborers employed on said work, but they shall not be liable, on this guarantee, beyond two thousand dollars, the estimated cost of the labor on said job; and said parties of the second part hereby agree with said city of Kansas that said party of the first part will well and faithfully perform each and all of the terms and stipulations in the foregoing contract to be done, kept and performed on the part of said party, and said parties of the second part shall not be liable hereon beyond the sum of eight thousand dollars."

It was held that the provisions of the bond were those of indemnity in favor of the city, and created no liability in favor of third persons. The court expressly declined to express an opinion with respect to the power of the city to enter into a contract for the benefit of third parties. It observed: "Whether the city would require the contractor to give a bond, which would be available to third persons in case of injuries received by them, on account of the negligence of the contractor, is a question which need not be considered."

The petition in this case alleges in effect that plaintiff, after the execution of the contract between Howard and the city of Bethany for digging said well, knowing that Howard was insolvent and relying solely upon the terms and conditions of said bond, did during the construction of said well, furnish to said Howard the material described in the petition, which was used in the construction of said well, and for which he has not been paid; and by these affirmative allegations he shows a breach of that condition of said bond by which it is provided that the said L. W. Howard "is to pay for all material used or furnished" for said well.

In the case of *City of St. Louis to use v. Von Phul, supra*, it is further observed: "The following cases uphold the right of third persons, such as subcontractors, laborers, and material men to maintain an action on a bond, given by a contractor to a state, county, city, or school district, conditioned for the faithful performance of a contract for a public improvement, and for the payment of all claims of such third persons, though no express power was given to the obligee to require such conditions." *Baker v. Bryan*, 64 Iowa, 562; *Lyman v. City of Lincoln*, 38 Neb. 800; *Sample v. Hale*, 34 Neb. 221; *Korsmeyer, Etc., Co. v. McCay*, 43 Neb. 649; *Kauffmann v. Cooper*, 65 N. W. Rep. 796. The same rule is announced in *The Board of President and Directors of the St. Louis Public Schools v. Woods*, 77 Mo. 197.

The city of Bethany is a city of the fourth class, and under its charter has the power to provide water for the use of its citizens and in letting the contract to Howard for that purpose it had the right under the authorities cited to require of him a bond as in this case, condi-

tioned for the payment of laborers, and material men, upon which they might sue upon breach of these conditions.

Our conclusion is that the petition states a cause of action and that the demurrer thereto should have been overruled.

For these considerations we reverse the judgment of the Court of Appeals and remand the cause to that court, with directions to reverse the judgment of the Circuit Court and remand the cause to be tried in accordance with this opinion. GANTT, P. J., and SHERWOOD, J., concur.¹

¹In *City of St. Louis to use, etc. v. Von Phul* (1896), 133 Mo. 561, cited in the text, the facts as stated by the court were as follows: The defendants Von Phul and Joseph Grimm secured a contract from the city of St. Louis to repair the sidewalks in a certain district. The contract provided in detail for the work, the materials to be used, and for the payment therefor by special tax bills to be charged against adjacent property. At the end of, and as a part of, the contract was this obligation, signed by the contractors and the Municipal Trust Company and Edward Butler as securities:

"The said St. Louis Sidewalk Company, Stephen Von Phul and Joseph V. Grimm, proprietors, as principal, and Municipal Trust Company and Ed. Butler as sureties, hereby bind themselves and their respective heirs, executors, and administrators, unto the said city of St. Louis in the penal sum of ten thousand dollars, lawful money of the United States, conditioned that in the event the said St. Louis Sidewalk Company shall faithfully and properly perform the foregoing contract according to all the terms thereof, and shall, as soon as the work contemplated by said contract is completed pay to the proper parties all amounts due for material and labor used and employed in the performance thereof, then this obligation to be void, otherwise of full force and effect, and the same may be sued on at the instance of any material man, laboring man, or mechanic, in the name of the city of St. Louis, to the use of such material man, laboring man, or mechanic, for any breach of the condition hereof; provided that no such suit shall be instituted after the expiration of ninety days from the completion of the above contract."

The Glencoe Lime and Cement Company furnished the contractors with materials for use in performing their contract. The suit was upon the contract, wherein plaintiff claimed a balance due on account of materials furnished amounting to \$9,153.30. The action was brought under the title of "The City of St. Louis to use of Glencoe Lime and Cement Company." It was held that the action could be maintained, for the reasons given in the text.

In the later case of the *City of Bethany v. Howard* (1899), 149 Mo. 504, a municipal corporation, the City of Bethany, sued in its own name upon the bond considered in *Devers v. Howard*, 144 Mo. 671, alleging that Howard had failed to pay for labor performed and materials furnished, in digging the well, by Miner & Frees, Cadle Lumber Co., W. L. Devers and R. T. Bedell.

There was a demurrer. Said the Court (per GANTT, P. J.): "Conceding that the four firms each had its several rights of action upon said bond for the amount due it, the question still remains as to the right of said city of Bethany to bring this action, under the circumstances detailed in the petition.

"It may be remarked in passing that it appears from the face of the petition that this is the same account upon which the case of *Devers v. Howard* was prosecuted, so far as Devers is concerned.

"A marked characteristic of this petition is that while it avers the bond sued on is available to the material men mentioned, this action is not brought by the city to their use as relators, but is an independent proceeding by the city as the trustee of an express trust.

"While it is settled law in Missouri that the trustee of an express trust may sue in his own name, inasmuch as this trustee bore a dual relation to this bond, the circumstances of this case justified the circuit court in sustaining the demurrer. The right of the material men under the contract and bond is independent of the city and they are not bound by the settlement with the city. For this reason, as the city has settled its claim with the contractor and paid over the balance due from it on the contract, it ought not to be permitted again to sue without disclosing its trust character, otherwise it may turn out that it might recover the amount due the material men, and the defendants still be liable to suit at the instance or in the names of the several material men. So far as the city is concerned, of course it has no right to bring the suit in its own right after the settlement it pleads.

TODD v. WEBER ET AL.

COURT OF APPEALS OF NEW YORK, FEBRUARY, 1884.

[95 N. Y. 181.]

Appeal from order of the General Term of the Supreme Court, which reversed a judgment in favor of defendants, entered upon the report of a referee.

The nature of the action and the material facts are stated in the opinion.

Robert S. Green, for appellants.

Wm. H. Arnoux, for respondent.¹

DANFORTH, J.—The complaint is two-fold: *First*: That the defendant's testator, the father of the plaintiff, although not the husband of her mother, being applied to by Margaret Voris, Francis A. Knapp, Hester A. Knapp, and Louise A. Story to provide for the plaintiff, promised them that he would pay for her maintenance, support, and education, by making due and sufficient provision for her by his last will, in consideration that they would support her during the term of his natural life; avers that these persons were relatives of the plaintiff's mother, and that upon this promise they maintained, cared for, educated, and supported the plaintiff, up to June 25, 1879, when the testator died.

Second: A promise by the testator to the plaintiff, and other persons acting in her behalf, that he would support and maintain her so long as she should live.

The testator made no provision for the plaintiff by will or otherwise.

These promises were denied by the defendants, and the referee, to whom the issues were referred, found against the plaintiff, because in his opinion no legal claim had been established, lamenting at the same time "that the simplicity and ingenuousness of the plaintiff and her witnesses"—the persons above referred to—"had been practiced upon." On appeal to the General Term that court held that the plaintiff might recover upon the first cause of action, but as to the second that no case was made out; reversed the judgment which had followed the report of the referee and ordered a new trial. From that order the defendants appealed to this court, assenting that if the order should be affirmed, judgment absolute should be rendered against them. (Code, § 191.)

"As held in *Devers v. Howard, et al, supra*, these material men can sue in the name of the city to their use, and control said actions, or in their own names, but the city upon its own showing is estopped from suing under the circumstances of this case without averring that the action is brought to the use of the material men. The demurrer was properly sustained and the judgment will be affirmed without prejudice to the right of the several material men to proceed in their own name or in the name of the city to their respective uses as relators, in which they will control their own suits and the judgment on demurrer in this case will constitute no bar."

¹ The arguments are omitted.

We think the referee and the General Term came to a correct conclusion in regard to the plaintiff's right under the second division of her complaint, and shall confine our discussion to the case made under its first branch.

The plaintiff was born June 27, 1852, her mother having been seduced by the testator under promise of marriage. The mother was hardly more than a child herself, and had no means of her own. She was living with, and wholly dependent upon, her own mother, who was then a widow. At its birth, the testator received the child into his arms, and in the presence of witnesses acknowledged his paternity. She remained at her grandmother's nine or ten years, and during that period was visited often by the testator, who at all times manifested great affection for her, and frequently told both the mother and grandmother "that he wished" them "to take good care of the child and bring her up right, and he would see that it was all right." As these assurances were given after as well as before he had married another woman, it is difficult to believe that they related to any other than pecuniary satisfaction for the services he invoked. The grandmother at all events provided the child with board, care, and clothing, paid all necessary expenses and sent her to school, paying the bills.

In 1863 or 1864, when asked by the plaintiff's mother, "Do you remember about your promise to do for this child?" he said, "Yes, and I will do well by her; if she outlives me I will remember her in my will." Again in 1870 he inquired of her mother how she (his daughter) was; how she was getting along with her music; if she was going to school; what music teacher she had. Being informed, he told her mother "to give her all the lessons she would take"; the mother replied, "that would cost something"; and he said, "You go on and have her take them; never mind about that, I will see that you are well paid." In 1876 his attention was again called to his promise to provide for the plaintiff, and he was asked, "if he had forgotten it," he said, "I have not, I shall remember her in my will if she outlives me." . . . ¹

¹ Reviewing the evidence, the Court (per DANFORTH, J.) continued from this point as follows: "She [the plaintiff] lived about two years, just after 1870, with her mother, and then with Mrs. Story and other relatives until 1879. During this time Mrs. Story boarded her and paid for her music lessons, and clothes, and other expenses. To Mrs. Knapp, her aunt, who during a long period cared for the plaintiff, testator said in substance, as he had before said to her mother and her grandmother, among other things, 'I want you to give her a good musical education'; and she speaking of the cost, he said, 'Don't worry about that, you will get it all back.' Being asked in what way, he said, 'I intend to do well by her in my will, them that do well by her will be well paid.' He wanted to know who was taking care of her, and Mrs. Knapp replied, 'We are all doing for her.' This occurred in 1860. Afterwards, in 1875 or 1876, manifesting the same interest in his child and the same intentions in regard to her, he inquired of Mrs. Knapp, in the presence of Mrs. Story, concerning her and her progress in music, expressed satisfaction at her success, and his wish that she should receive a good education in that science. As to the expense he repeated, 'You will get that all back. I have enough of this world's goods. I am only living for a name.' When they asked 'if he could not do something for her now,' he said, 'Not now, but as I said before, I will do well by her; I will remember her in my will,' and with other conversation added in conclusion, 'Well, take good care of her, . . . you will all be well paid.'"

The plaintiff was informed by her relatives of these promises of the testator, and with that knowledge, and in reliance upon them, assured the different persons who were taking care of and providing for her, (and, among other times, after she was twenty-one years of age), that whatever they did for her she would when able repay.

It is needless to recall more of the testimony. It is in no respect contradicted, and has been accepted as credible by the learned referee and the General Term. The plaintiff from her birth to the commencement of this action has been cared for, maintained, and educated by those relatives, each at different periods and at large expense. Its amount has been found and stated by the learned referee. He says: "From the time of the birth of the plaintiff to the time she went to live with her cousin (Mrs. Story), the plaintiff's grandmother and aunt have paid, laid out, and expended for her in various necessary ways, and for her education and maintenance, services and moneys, amounting in all to \$17,069.43, and the plaintiff's cousin, with whom she has lived from 1874 to the commencement of the suit, has also paid out considerable sums of money for her support and maintenance, amounting in all to \$3,799."

Notwithstanding all this, the learned referee felt constrained to dismiss the complaint. He thought the testator had practiced dissimulation, but so successfully that he was bound only by his own conscience, and that no action lay against him though he did not perform his promises. We can not agree to this. In our opinion there is in the record, as above quoted, evidence of an agreement made upon valuable consideration, and, therefore, also binding in law upon him and consequently upon his estate. . . .¹

1 On this question of substantive law, the court (per DANFORTH, J.) continued from this point as follows: "It is true that by the common law the child that is born before marriage is so far *nullius filius* that he can not inherit; but he may acquire rights. Nor is his putative father under any legal liability at common law to support him, *Moncrief v. Ely*, 19 Wend. 405. Yet it is said he may take him out of the parish, *Sherman's Case*, 1 Ventris, 210, and maintain him, or by will leave any of his property to him, or in his lifetime make other provision for his support. So if he acknowledges or adopts the child as his own, and at his request it is cared for by others, he becomes liable in favor of the party providing for it, *Moncrief v. Ely*, *supra*; *Birdsall v. Edgerton*, 25 Wend. 619, and remains so until he renounces the child or otherwise notifies the persons who have it, that he will no longer be bound to them. From these or like circumstances a promise to make compensation may be implied, and of course such a promise may also be expressed by him. In either case the natural obligation arising out of the relation of the putative father to his child will uphold a contract upon which an action may be sustained. *Hesketh v. Gowing*, 5 Esp. 131; *Nichole v. Allen*, 3 C. & P. 36; *In re Plaskett's Estate*, 30 L. J. Eq. 606; *Moncrief v. Ely*, *supra*; *Birdsall v. Edgerton*, *supra*; *Hook v. Pratt*, 78 N. Y. 371; 34 Am. Rep. 539.

"*Duncan v. Pope*, 47 Ga. 445, cited by the appellant, goes no further than to hold that in the absence of a contract for his support a bastard can not maintain an action against his putative father, or his estate. On the other hand it holds that if he voluntarily makes an agreement for it, not only may the father be bound but his representatives, while *Nine v. Starr*, 8 Oreg. 49, also cited by him, decides only that when the mother alone is bound to maintain the child she can not maintain an action upon the father's agreement to pay her for doing so. But even in such a case, if any provision for the child beyond such legal maintenance be included in the consideration, it is sufficient, and the promise valid. *Smith v. Roche*, 6 C. B. (N. S.) 223; *Folitt v. Koetzow*, 2 H. & E. 730.

If I am right in these conclusions there is before us a valid contract made between the testator and the several persons named, for the benefit of the plaintiff.

The only remaining question is one of the parties—who should bring the action for its enforcement. As she had the sole beneficial interest in the contract, it was, we think, properly brought in her name. This would seem plain enough upon principle, but it is also well established by authority. In *Dutton and Wife v. Poole*, 2 Levinz, 210, decided in the time of Charles II. [1677], a son promised his father, upon a consideration moving from him, to pay his daughter £1,000. Upon default the daughter sued. After verdict for the plaintiff, it was argued in arrest of judgment that the action should have been by the father, not the daughter, for the promise, it was said, was made to the father, and the daughter was neither privy nor interested in the consideration, nothing being due to her. The court seemed to hesitate, but after more than one hearing and citation by counsel of cases *pro* and *con*, it was held in favor of the plaintiff, the chief justice saying that there

"In *Moncrief v. Ely*, *supra*, it is held that at common law an action will lie against him for the support of his child upon an express promise, or if he had adopted the child as his own, upon an implied promise in favor of the party maintaining it; but the plaintiff in that case failed to recover, because there was no evidence of a promise express or implied. This case was followed in *Birdsall v. Edgerton*, *supra*. Indeed it has never yet been held that there was any thing illegal in an undertaking by a putative father to support his bastard, or to pay a sum of money in consideration of such support being furnished by another, though that other person was the mother of the child. Upon principle and authority such a promise must be regarded as valid.

"But notwithstanding this, the learned counsel for the appellant argues that the promises made by the testator to Mrs. Voris, Mrs. Knapp, and Mrs. Story were without consideration—mere naked promises, and not enforceable. The learned referee finds that the testator did not expressly promise to pay the plaintiff's relatives, nor any one else, for the expenses incident 'to her maintenance and support, and whatever was said by him was contingent on the plaintiff's outliving him, and was limited to such provision as he might make for her by his will.' And before us the appellant, while contending that the testator made no express promise to pay them, adopts the language of the referee and declares that 'his promise was contingent on plaintiff's outliving him,' adding, 'his words may have held out a hope of repayment, but there was no promise.' If it rested there it would be difficult for a court to hesitate in pronouncing against such designed evasion of obligation. There was in any aspect a precise representation of an intention on the part of the testator at a future time, and in a specified manner, to assume the burden of expense for those things he solicited his child's relatives to perform. By that avowed intention they were induced to act. It is immaterial that no promise in response thereto was made by them. Their conduct was a sufficient acceptance of his proposition and furnished the consideration for his undertaking. It was indeed contingent. It consisted in the doing of acts by the promisees, which, it is true, they need not have done unless they chose, but being done at the instigation of the testator, completed the contract and made the promise binding. *Coles v. Pilkington*, L. R., 19 Eq. Cas. 178; *Booth v. C. Rolling Mill Co.*, 74 N. Y. 15. In a book of considerable antiquity, but still of authority (*Doctor and Student*, dialogue 2, chap. 24), after speaking of naked promises upon which no action would lie, the learned author says: 'If he to whom the promise is made, have a charge by reason of the promise, which he hath also performed, then in that case he shall have an action for that thing that was promised, though he hath made the promise have no worldly profit by it.' And among other illustrations it is said, 'If a man say unto another, marry my daughter and I will give thee twenty pounds; upon this promise an action lieth if he marry his daughter.' And in this case the author says, 'He can not discharge the promise, though he thought not to be bound thereby; for it is a good contract, and he may have *quid pro quo*, that is to say, the preferment of his daughter for his money.' And so here the testator is bound, although he intended only to pervert.

was such apparent consideration of affection from the father to his children, for whom nature obliges him to provide, that the consideration and promise to the father may well extend to the children, and the judgment then given was, on error brought, affirmed in the Exchequer Chamber.

A century later Lord Mansfield, in *Martin v. Hind*, Cowper, 437-443, referring to *Dutton v. Poole*, *supra*, said, "It was a matter of surprise how a doubt could have arisen in that case."

A few years after, in 1806, a similar question came before the Supreme Court of this State, in *Schemerhorn v. Vanderheyden*, 1 Johns. 139, where the facts were that in consideration of one J. C., the father of the plaintiff's wife, assigning to the defendant certain personal property, the latter promised to purchase for the daughter a cherry desk. He failed to do so, and for that breach the action was brought by the husband of the daughter, he suing in her right. It was objected that no action could be maintained by the plaintiff on the promise made to J. C.; but the court held otherwise, saying, "where one person makes a promise to another for the benefit of a third person, that third person may maintain an action on such promise," citing *Dutton v. Poole*, *supra*, and saying the same principle has since that time been repeatedly sanctioned by the decisions of the English courts.

A different rule is said to prevail in those tribunals at the present time, per Wightman, J., in *Tweddle v. Atkinson*, 1 Best & Smith,

"The books are full of cases where such contracts are supported. Among modern ones are *L'Amoureux v. Gould*, 7 N. Y. 349, and *Marie v. Garrison*, 83 id. 14. In the first it was held that where in consideration that A. would pay certain notes upon which he was an indorser, but not then charged as such, or under any obligation to pay the same, B. agrees to pay him a certain sum of money; if A. does pay the notes he furnishes a consideration for the agreement, and may enforce it against B. It is obvious that at the time the agreement was entered into there was no mutuality in the contract, because A. came under no obligation to pay; but when he did pay, the consideration was supplied and the promise attached. So in a case where an order for goods is given, it is said to be in effect an offer to purchase and the sale to be complete when they are furnished, and when one offers to supply goods to another at a certain price, he is bound by an order given in accordance with the tender. Upon the same principle a reward may be legally claimed by one complying with the conditions on which it is offered although the promisor could sue no one for not doing the thing called for. *Jones v. Phoenix Bank*, 8 N. Y. 228; *Pierson v. Morch*, 82 id. 503. And it makes no difference that the promise is to make compensation by will.

"At the death of the testator the consideration had been fully performed, and the promise attached. Its enforcement therefore may stand upon the principle that where one person assumes a charge, or alters his position, or does any act by reason of a promise or representation made by another, the person making the promise or representation can not withdraw from it, but is bound by it, although he did not intend to be. Moreover in the case before us the testator did have a full *quid pro quo*. What he desired was that his daughter should be well cared for and educated. He wanted also that this should be done by his daughter's relatives, and to stimulate them to do that which they were in no sense bound to do, he represented or promised that provision should be made for her by will. It was as if he had said, 'Take good care of her, clothe and feed her and educate her during my lifetime, and at my death she shall have from my estate a sum at least equal to the cost of all you do and expend for her.' He had his wish. They performed with his sanction the acts which he desired. He has not done the thing he promised to do in return, and as his death limited the time for his performance, his omission and the happening of that event constitute a breach and complete a cause of action which the law will enforce against his estate. *Jacobson v. Executors of Le Grange*, 3 Johns. 199; *Patterson v. Patterson*, 13 id. 379."

Q. B. 393; 101 Eng. Com. Law R. 393, and there even in equity the doctrine of the earlier cases may be considered as unsettled. (Pollock's Principles of Contract, 196.) But in this state it has, I believe, been uniformly adhered to. In 1817 it seems to have been approved by Chancellor Kent, *Cumberland v. Codrington*, 3 Johns. Ch. 254. The question came directly before him in 1823, and it was answered in the same way upon the principle asserted in *Dutton v. Poole*, *supra*, and the learned chancellor held that where a father conveyed land to his son on his covenanting to pay an annuity to his mother during her widowhood, she might maintain an action on the covenant so made for her benefit, *Shepard v. Shepard*, 7 J. Ch. 56; and in 1845 his successor says it has been the settled law from the time of the decision of the case of *Dutton v. Poole*, *supra*, down to the then present time, that a party for whose benefit a promise is made may sue in *assumpsit* upon such promise, although the consideration for such promise was a consideration between the promisor and a third party.

Such also was the conclusion of the late Supreme Court of this state, after a full examination of the authorities, in *Barker v. Bucklin*, 2 Denio, 45. Also by the present Supreme Court in 1859, in *Judson v. Gray*, affirmed by this court, 17 How. Pr. 289. In *Burr v. Beers*, 24 N. Y. 178, the judgment was in terms supported upon, as was said, "the broad principle that if one person make a promise to another for the benefit of a third person, that third person may maintain an action on the promise," and Denio, J., after a review of the authorities, said, "We must regard the point as definitely settled so far as the courts of this state are concerned."

It seems unnecessary to follow the line of authorities further. The plaintiff is within the rule. The contract upon which she sues was made for her benefit as its object. It is the doctrine of the first and last case that she may enforce it. This conclusion is also in harmony with the general current of authority. In the Supreme Court of the United States, *Hendricks v. Lindsay*, 93 U. S. Rep. (3 Otto) 143, it is said, "The right of a party to maintain *assumpsit* on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country." This conclusion makes it unnecessary to consider the ground on which the court below held that a partial recovery could be had in this case.

It may be conceded that if the plaintiff had not outlived the testator, no action at all would lie, for that she should, of the two, be the longest liver was one of the conditions upon which his promise was made. He died first. The condition then was fulfilled. The plaintiff is, therefore, entitled to recover of the defendants the amount found by the referee to have been paid, laid out and expended for her by her relatives, as above stated, together with interest from the death of the testator.

The order of the General Term should, therefore, be affirmed, and judgment absolute ordered for the plaintiff, with costs.

All concur, except ANDREWS, J., who dissents.

*Order affirmed and judgment accordingly.*¹

BUCHANAN v. TILDEN.

COURT OF APPEALS OF NEW YORK, JANUARY 24, 1899.

[158 N. Y. 109.]

Appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 2, 1896, reversing a judgment in favor of plaintiff for \$54,421.18, entered upon a verdict directed by the court, and ordering a new trial.

The nature of the action and the facts, so far as material, are stated in the opinions.

Louis S. Phillips and *William B. McNiece*, for appellant.

Delos McCurdy, for respondent.²

BARTLETT, J.—At the close of plaintiff's case, both parties moved for a directed verdict, and neither asked to go to the jury on any question.

The trial judge thereupon directed a verdict for the plaintiff. The Appellate Division, with a divided court, reversed the judgment in plaintiff's favor entered upon the verdict and ordered a new trial. The plaintiff has appealed from that order, stipulating for judgment absolute in case of affirmance, and presents for our determination a single question of law arising upon undisputed facts.

Before stating that question, reference will be made to the material facts.

The plaintiff is the adopted daughter of Moses Y. Tilden, a brother of the late Samuel J. Tilden. The defendant is an heir at law and next of kin to Samuel J. Tilden. On the 20th day of October, 1886, the defendant began an action against the executors of the estate of Samuel J. Tilden and others, praying judgment that the thirty-fifth article of

¹ Compare *Sullivan v. Sullivan* (1900), 161 N. Y. 554, 557, given in the ext, *infra*.

See also, *Little v. Banks* (1881), 85 N. Y. 289. [Action to recover damages sustained by the plaintiffs as law-book sellers for an alleged refusal by the defendants to sell and deliver to them certain copies of the New York reports, published by the defendants under a contract with the state. This contract provided that the publishers (the defendants) should furnish any volume published under the contract to any law-book seller in New York City or Albany who applied therefor and offered the contract price, and that on failure so to do the publishers should "forfeit and pay the sum of \$100, hereby fixed and agreed upon, not as a penalty but as liquidated damages . . . to be sued for and recovered by the person or persons so aggrieved." Plaintiff's offer was within the terms of this contract.] A recovery was permitted upon "the broad principle of public policy essential to the public welfare."—*Ed.*

² The arguments are omitted.

Mr. Tilden's will be adjudged void, and that the property therein mentioned be declared undisposed of by any provision thereof.

The defendant being without means to prosecute this action, applied to Robert D. Buchanan, the husband of the plaintiff, for assistance in raising the funds necessary to carry on the litigation. Buchanan expressed his willingness to aid defendant if certain arrangements were made, and said that his uncle, Robert G. Dun, might be willing to advance the money required.

The defendant expressed himself as willing "to do anything in the world to raise the money—to make any arrangement that was reasonable," and said to Buchanan that if the contest was successful, Mrs. Buchanan "should come in share alike with the rest of them." It was evidently within the contemplation of the parties that if this action of the defendant was successful, the result would be that, as to a very large part of his estate, Mr. Tilden died intestate, and that while the plaintiff, as an adopted child of Moses Y. Tilden, and not of Samuel J. Tilden's blood, might take no part thereof, yet there were the strongest moral and family reasons why she should be regarded as an heir at law and next of kin.

Buchanan induced Dun to make certain necessary advances to the extent of five thousand dollars, and Dun consented to do so solely on the ground that plaintiff was to share the fruits of a successful contest, he being unacquainted with the defendant.

This portion of the money was advanced by Dun about the time the defendant began his action, and he was then presented to Dun and repeated to him the promise in regard to plaintiff sharing alike with the rest of the heirs that he had made to her husband. In February, 1887, the defendant asked Buchanan if he could raise more money.

Buchanan testified that in response to this application, "I told him that I thought before any more money was talked about that the arrangement that had been talked about had better be whipped into line . . . and he said they were all perfectly willing to share and share alike in that matter. I said that does not satisfy me; that is not what I want; I want some positive agreement. After considerable further talk, he said that his brothers and sisters were scattered; that he could not get it into shape just then, but that he had to have some more money and had to have it right away, and in order to get the money and have it right away, he, on his own personal behalf, having nothing to do with his brothers or sisters in any sense, would obligate himself to pay personally fifty thousand dollars." Thereupon defendant and Buchanan went to the office of counsel where the following letter was drawn up, signed by defendant, and delivered by Buchanan to Dun:

New York, February 19th, 1887.

"ROBERT G. DUN, Esq., No. 314 B'way., N. Y. City,

"My Dear Sir: It is understood between Mr. R. D. Buchanan and myself that in the event of the success of the proceedings now pending, or any which may be

taken, to practically set aside the thirty-fifth section of the will of my late uncle, Samuel J. Tilden, in view of the assistance looking to that end, which has been and may be rendered by Mr. Buchanan as well as by yourself, that I will, and hereby do, become responsible for the payment to Mrs. Adelaide E. Buchanan, or her order, of the sum of fifty thousand dollars.

"It is further understood between us that, while I am not strictly authorized to speak in behalf of my brothers and sisters in that respect, that from what has already transpired between me and them, in the event of such success, they will be disposed to act generously with Mrs. Buchanan in the premises.

"Yours very resp'y.,

"GEORGE H. TILDEN."

It will be observed that this letter, while charging defendant in a fixed sum, leaves open the general adjustment between plaintiff and defendant's brothers and sisters.

After receiving this written declaration of the defendant, Dun continued his advances until they aggregated over twenty thousand dollars.

A long contest followed in the courts; defendant succeeded in his action, and he and others became entitled to a very large sum of money that the late Samuel J. Tilden supposed he had dedicated to public uses under the thirty-fifth article of his will.

Dun testified that the defendant had repaid his advances; that they were collected through his attorney, but he thought an action was brought against him.

Defendant paid plaintiff eight thousand one hundred and fifty dollars on account of the fifty thousand dollars under the letter of February 19th, 1887.

As nothing more was paid, and plaintiff received no recognition from the heirs at law and next of kin of Mr. Tilden, she brought this action to recover the balance of the fifty thousand dollars and interest.

One of the learned judges of the Appellate Division thus states the question of law presented in this case: "Can a wife enforce payment in her own name where the husband renders valuable services and stipulates with the person to whom the same are rendered that compensation therefor shall be made, not to him, but to her?"

In answering this question in the negative, the main positions of the court below may be briefly stated.

While admitting that there is a distinct class of cases where promises have been made to a father, or other near relative, for the benefit of a child, or other dependent relative, in which the person for whose benefit the promise was made has been permitted to maintain an action for the breach of it, and further admitting, for argument's sake, that the duty and obligation of the husband to the wife is, as a consideration, quite equal to the duty and obligation of the father to the child, yet the fact still remains in the case at bar that this is not a contract looking towards the discharge of the obligation which the husband owed to

support the wife, and must, therefore, be supported, if at all, upon the mere relation of husband and wife.

The learned court then states that it has found no authority for holding that a promise made to the husband by a third person for the benefit of his wife, which was not intended to provide for her support, or to discharge the husband's duty in that regard, could be enforced by the wife.

It is also intimated that there is no disposition to extend the principle of some of the cases relating to father and child to any other relationship.

As to this latter suggestion, we do not think it will be seriously questioned, on principle, that the relation of husband and wife is fully equal to that of parent and child as a consideration to support a promise.

Before discussing this appeal in the light of the authorities, we have to say that, in our judgment, the learned Appellate Division have failed to give due weight to certain controlling features of this case.

In the first place, the question formulated by the court below does not contain what we regard as one of the most important points disclosed by the evidence, to wit, the large equitable interest the plaintiff had in this scheme to attack the will under the provisions of the agreement made to raise funds for that purpose. This is not the case simply of a husband rendering valuable services to a third party upon the latter's promise to pay the compensation, not to him, but to his wife.

While this case embraces that feature, it involves the further element of the wife's joint interest in the scheme to attack the will.

It may fairly be inferred from this record that the defendant was powerless to conduct the action he had begun unless some one furnished him the funds.

This assistance was rendered by Buchanan and Dun, upon the express agreement and understanding that the plaintiff should receive, in case of success, fifty thousand dollars from defendant as part of her share of the estate, and generous treatment from his brothers and sisters. Plaintiff, in equity and good conscience, as an adopted child of Moses Y. Tilden, was entitled to come in and share with the other heirs and next of kin the large fund that had been freed from the provisions of the will. When this equitable right, or interest, is coupled with the relation of husband and wife, we have presented a situation that affords ample consideration for the contract sued upon—a situation that distinguishes this action from any of the cases where the party suing upon a promise rests exclusively upon a debt or duty owed him by the promisee.

Another general feature of this case, to which we think the court below has failed to give due prominence, is the extent of the legal and moral obligation resting upon a husband to support and provide for his wife.

A brief quotation from one of the opinions below will make this point clear:

The court says: "It is quite true that the husband is under an obligation to support the wife, and it may be that any contract which he makes with a third party, having for its object the carrying out of that obligation, would be enforced in the courts."

Then coming to the case at bar, the court continues: "There is no obligation, legal or equitable, here on the part of the husband towards the wife to entitle her to the performance of this contract.

"This was not a contract for her support, nor was it one to do anything which, under any circumstances, the husband could be compelled to do. It was simply an obligation on the part of the defendant to pay the plaintiff a sum of money, as an independent fortune for her separate estate, in case the husband rendered some service to him. So far as the plaintiff and her husband were concerned as to this contract, there were no legal relations between them; they occupied no different relations from that of any other man and woman," etc., etc.

It seems to us that this is an entire misconception of the duties and relations existing between man and wife. It is, in effect, said that it is only the duty of bare maintenance that is a consideration sufficient to support the promise of a third party.

We are of opinion that a husband rests under other and far higher moral and legal obligations that the law will recognize as a sufficient consideration to support a covenant in favor of the wife.

There is no evidence in this case to bear out the statement that this was not a contract for the wife's support; but assuming that she had food, raiment and shelter—the necessities of life—can it be said that these represent the full measure of the moral and legal obligations imposed upon a husband by the common law?

Is it not his bounden duty, if opportunity offers, to provide for his wife against that day when he may be incapacitated by disease or removed by death? If, as in the case at bar, the husband seeks to provide for his wife, beyond the duty of furnishing food and shelter, by securing a fund to which she is equitably entitled, that may perpetuate his protecting care after he has departed this life, shall it be said that this is not an obligation that a court can recognize as a sufficient consideration to support a covenant on her behalf? We are of opinion that this broader view of the duties and obligations of a husband is to be invoked in determining the rights of this plaintiff.

We come then to a consideration of this case in the light of precedent. The court below recognized the strong equities of the plaintiff's case and expressed regret that the action is not sustainable in her behalf.

Our full discussion of the facts and the position of the court below discloses, we think, a very strong case in favor of the plaintiff maintaining this action.

While it is true that for more than two hundred years the courts of England and this country have been discussing the vexed question of when a party may sue upon a promise made for his benefit to a third party, yet we are of opinion that under the peculiar facts of this case, the plaintiff can recover by invoking legal principles that are well established by authority.

In order to maintain the plaintiff's cause of action, it is not necessary to invoke the principle established by *Lawrence v. Fox*, 20 N. Y. 268, and the cases that have followed it in this state, to the effect that an action lies on a promise made by a defendant upon valid consideration to a third person for the benefit of the plaintiff, although the latter was not privy to it. It will be recalled in that case that one Holly loaned the defendant Fox money, stating at the time that he owed the amount to the plaintiff Lawrence for money borrowed which he had agreed to pay the then next day; the defendant, in consideration of the loan to him, agreed to pay the plaintiff the then next day.

This court in holding that the plaintiff Lawrence could enforce that promise in an action at law established a legal principle that the courts of England have never recognized.

The plaintiff in the case at bar, if driven to it, might doubtless derive aid and comfort from the doctrine laid down in *Lawrence v. Fox* by parity of reasoning, but we think her case rests upon very different principles.

The first case to be considered is *Dutton v. Poole*, [1677] 1 Ventris, 318-332, decided in England in the reign of Charles II.¹

The plaintiff declared in *assumpsit* that his wife's father, being seized of certain lands now descended to the defendant, and being about to cut a thousand pounds worth of timber to raise a portion for his daughter, the defendant promised to the father, in consideration that he would forbear to fell the timber, that he would pay the daughter one thousand pounds.

After the verdict for the plaintiff on non-assumpsit, it was moved in arrest of judgment that the father ought to have brought the action and not the husband and wife. The court said: "It might have been another case if the money had been to have been paid to the stranger, but there is such a nearness of relation between the father and the child, and 'tis a kind of debt to the child to be provided for, that the plaintiff is plainly concerned."

The judgment was affirmed in the Exchequer. 2 Lev. 212; Raym. 302.

In one of the opinions of the Appellate Division in the case at bar, it is stated that *Dutton v. Poole* has been repudiated in *Tweddle v. Atkinson* [1861], 101 Eng. C. L. R. 393.² A careful examination of this latter case shows that Justice BLACKBURN, while attacking *Dutton v. Poole*, says: "We can not overrule a decision of the Exchequer Chamber."

¹ See Langdell's *Cases on Contracts*, 170, for a report of this case.

² See Langdell's *Cases on Contracts*, 174, for the report of this case.

LORD MANSFIELD said of *Dutton v. Poole*, a hundred years later, that it was difficult to conceive how a doubt could have been entertained about the case. *Martyn v. Hind*, Cowp. 443; Doug. 142. It has also been repeatedly followed in this state.

The learned counsel for the defendant, in an able and comprehensive brief, complains that *Dutton v. Poole* has, on several occasions, been cited to sustain the broad doctrine that a stranger to the consideration and to the promise may maintain an action on a contract. He points out that such an alleged erroneous citation appears in *Schemerhorn v. Vanderheyden*, 1 Johns. 139, and that it has led to confusion in subsequent cases. We are not concerned at this time whether this is a just criticism or not, as there can be no doubt that *Dutton v. Poole* rests upon the nearness of the relation between father and child, and to this extent is undoubted authority.

In *Shepard v. Shepard*, 7 Johns. Ch. 57, *Dutton v. Poole* is approved and followed, and Chancellor KENT also recognizes the principle contended for in this case, that the consideration of natural affection, and to make sure the maintenance of a wife in case she survived her husband, is "very meritorious."

There were two principal points decided by Chancellor KENT in this case. The first being that although a deed from the husband directly to his wife is void in law, yet, where the conveyance of the husband is for the purpose of making a suitable provision for the wife "in case she should survive him," equity will lend its aid to enforce its provisions. The second point held that where a husband conveyed land to his son, for a nominal sum, on his covenanting to pay an annuity to his mother during her widowhood, that the wife could sue on this covenant so made for her benefit, and that an attempted release of the son from the covenant by the husband, in his lifetime, was fraudulent and void. The learned chancellor said: "But if the deed of 1808 was out of the question, I should then have no difficulty in declaring that the defendant was bound to pay her the stipulated annuity, or the gross sum of four hundred dollars in lieu of it, on her releasing," etc. . . . "The relationship between husband and wife was sufficient to entitle the plaintiff to her action upon the covenant to her husband, and which was made for her benefit. The consideration enured from the husband, and arose from the obligation of that relation," etc. The chancellor then comments approvingly and at length upon *Dutton v. Poole*, points out the subsequent commendation of it by LORD MANSFIELD, and concludes by saying: "The same doctrine appears in the more early case of *Starkey v. Mill* (Sty. 296), and it has had the sanction also of Mr. Justice BULLER in *Marchington v. Vernon* (1 Bos. & Pul. 101, in *notis*), but it is quite unnecessary to dwell longer on this second point."

While the chancellor allowed relief to the plaintiff by enforcing her deed in equity, yet he distinctly held that she had the additional remedy of an action on the covenant between her husband and the son if

there were no deed, by reason of the relations and obligations of husband and wife, resting his decision squarely on the case of *Dutton v. Poole*.

With this case approved by Lord Mansfield, Justice Buller, and Chancellor Kent and followed in this state, it is not of controlling importance that the doctrine of this and other early cases is said to be questioned in England at the present day.

In a jurisdiction where the doctrine of *Lawrence v. Fox* is the settled law, there is no difficulty in sustaining both in law and equity the kindred principle announced in *Dutton v. Poole*.

It is quite impossible to follow the learned counsel on both sides of this case in the exceedingly interesting and exhaustive discussion of the questions involved, as the limits of an ordinary opinion forbid it.

We shall content ourselves with the citation of but one more case. In *Todd v. Weber*, 95 N. Y. 181, this court held that the relation of parent and child, even between a father and his illegitimate daughter, was a sufficient consideration for a contract made by him with the relatives of his unfortunate child to pay for her support and maintenance, and that she could enforce it by action. The learned judge writing for the court in that case, in an opinion that does honor to his heart as well as his intellect, quotes with approval *Dutton v. Poole*.

We see no valid distinction in principle between this relation of parent and child and husband and wife as affording an ample consideration for covenants enuring to the benefit of the child or wife.

The relation of husband and wife has been twice recognized in this state in cases just cited, as a sufficient consideration for supporting a covenant in the wife's favor and amply sustaining the plaintiff's cause of action in the case at bar.

This court has recently held that while the common law rule that husband and wife are one has been to some extent abrogated by special legislation, yet there are situations where that unity still exists.¹ The case before us illustrates a situation where that unity survives for the purpose of aiding the wife to enforce a covenant for her benefit made by her husband, and which equity and good conscience approve. The Appellate Division refer to *Durnherr v. Rau*, 135 N. Y. 219, as "a case while not directly in point is in its controlling principles adverse to the plaintiff's right to maintain this action." We think that case has no application to the one before us. The husband of plaintiff conveyed to the defendant certain premises, the latter covenanting to pay all incumbrances on the premises "by mortgage or otherwise." The deed declared that the wife (the plaintiff) reserved her right of dower. By the foreclosure of mortgages on the premises, existing at the time of the conveyance and in which the wife joined, her dower interest was extinguished. The wife sued on the defendant's covenant in the deed to pay

¹ *Citing, Wetmore v. Wetmore*, 149 N. Y. 520, 529; *Bertles v. Nunan*, 92 N. Y. 152.

all encumbrances and sought to recover the value of her dower interest cut off by the foreclosure. This court held that the covenant was with the husband alone, as the wife was not bound to pay the mortgages, and that the joinder of the wife in the mortgages was a voluntary surrender of her right of dower for the benefit of the husband, and bound her interest to the extent necessary to protect the securities. It is perfectly clear under this state of facts that the husband rested under no duty to protect the wife's dower interest. There was no legal or equitable obligation which the wife could lay hold of to enable her to sue on the covenant. The court points out that it is not sufficient that the performance of a covenant may benefit a third person, but it must have been entered into for his benefit.

The case at bar is decided upon its peculiar facts. We do not hold that the mere relation of husband and wife alone constituted a sufficient consideration to enable the plaintiff to maintain this action. We deem it unnecessary to decide that question at this time. What we do hold is, that the equities of the plaintiff were such that when considered in connection with the duty of her husband to provide for her future, and with that purpose in view, the money was procured for the defendant to institute and pursue the necessary litigation to secure the fund to which her equities related, all taken together, were sufficient to sustain the plaintiff's action.

The order of the Appellate Division granting a new trial and the judgment entered thereon should be reversed and the original judgment in favor of the plaintiff and against the defendant affirmed, with costs in all the courts.

GRAY, J. (dissenting). I think that the order appealed from should be affirmed and that any other doctrine than that laid down by the Appellate Division would be without support in principle, or in the cases. The defendant needed money, in order to prosecute an action to set aside certain provisions of the will of Samuel J. Tilden, deceased. He applied to the plaintiff's husband for that purpose, and the latter procured Dun to advance the money. The agreement between the defendant and the plaintiff's husband was that, in the event of the success of the action, in view of the assistance rendered by the latter, as well as by Dun, the defendant would become responsible for the payment to the plaintiff of the sum of \$50,000. The action was successful and the defendant repaid the money loaned. In addition, he gave to the plaintiff a sum of \$8,500; but she has brought this action to compel the payment by the defendant of the whole sum mentioned in the agreement.

The question is, whether the plaintiff had a cause of action upon the contract. It seems to me that this case is not brought within that class of cases, wherein a third person is entitled to enforce a promise which has been made by one person to another; because of the absence of the essential element that some liability or duty must exist from the

promisee to such third person in connection therewith. As it was held in *Durnherr v. Rau*, 135 N. Y. 219, the rule is that to permit a third party to enforce such a promise, the promisee must have a legal interest that the covenant be performed in favor of the party claiming performance. How was that the case here? Could it be because of the general obligation on the part of the plaintiff's husband to support and maintain her? That, of course, is a well recognized obligation in the law; but did the contract in question have that for its object? I can not so regard it. It related solely to the payment of a large sum of money contingently upon the success of a certain litigation, of which the defendant was the promoter, and promised a reward or compensation to the party with whom made for his aid in furnishing the needed moneys. It is perfectly clear that this contract was not based upon marital obligations; but that it was simply a mode, suggested by the husband and adopted by both parties, for the payment by the defendant of the consideration for his, the plaintiff's husband's, services in the matter. It does not appear that the plaintiff's cause of action has any other basis than the mere fact of the marital relation. While that relation imposes strong legal and moral obligations upon the husband, it is difficult to see that they involve a liability on his part to provide a separate estate for his wife and, yet, if there is not that liability, what liability was there towards the plaintiff, which furnished the element, required to exist in order that the third person, the plaintiff here, might claim the right to enforce the promise? It is not necessary that the wife should be privy to the consideration of the promise; but it is necessary that the promisee, her husband, should owe some debt or duty to her, in connection with the promise, to enable her to sue upon it.

I think that the insuperable legal objection to the plaintiff's cause of action is, that the contract in question was not one which looked towards the discharge of any obligation owing by him to her and, therefore, is not enforceable upon the doctrine which underlies the cases where, as in the relation of parent and child, the promisee owed a duty which the contract was supposed to meet. I am prepared to admit, as it is argued, that we should recognize the obligation of the husband to support the wife to be as meritorious as the obligation of the parent to support the child, and, if this contract could be regarded in that light, I might be prepared to extend to the present case the principle of the cases referred to. But, as previously suggested, the relationship between the parties here does not help us out in endeavoring to find support for the plaintiff's cause of action; for the reason that the contract, which is sought to be enforced, does not bear upon the husband's obligation and is not connected with it, but simply provides for the payment of a sum of money as a compensation for his services in the event of success.

In view of the more elaborate discussion in the opinion below, I think nothing more need be said and that the order should be affirmed.

HAIGHT, MARTIN, and VANN, JJ., concur with BARTLETT, J., for reversal. PARKER, Ch. J., and O'BRIEN, J., concur with GRAY, J., for affirmance.

*Order reversed, etc.*¹

PATRICK SULLIVAN, as Administrator of CATHERINE SULLIVAN, Deceased, Respondent, *v.* CATHERINE SULLIVAN, Appellant.

COURT OF APPEALS OF NEW YORK, FEBRUARY 6, 1900.

[161 N. Y. 554.]

Appeal from a judgment of the Appellate Division of the Supreme Court affirming a judgment in favor of the plaintiff, entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Burton S. Chamberlin, for appellant.²

Frederick Collin, for respondent.³

WERNER, J.—On the 10th day of October, 1892, the plaintiff's intestate, Catherine Sullivan, deposited with the Chemung Canal Bank the sum of \$2,000, and received therefor a certificate of deposit in the following form :

"ELMIRA, N. Y., October 10th, 1892.

"\$2,000.

"Catherine Sullivan has deposited in this bank two thousand dollars payable one day after date to the order of herself, or in the case of her death to her niece, Catherine Sullivan, of Utica, upon the return of this certificate, with interest at 3 per cent. per annum, if held six months. Not subject to check.

"No. 26638.

J. H. ARNOT, V. P."

She retained possession of this certificate until her death, which occurred on the 8th day of February, 1893, and after her death it was found among her papers.

This action was originally brought against the individuals who composed the firm known as the Chemung Canal Bank, and was upon their application continued against the present defendant, who claims to be

¹ In the course of this case before appellate tribunals, twelve justices passed upon the questions involved. In the Appellate Division of the Supreme Court four justices were for reversing the judgment below, which was for the plaintiff; one justice was in favor of affirming it. In the Court of Appeals four justices were for affirming this original judgment, and reversing the Appellate Division; three would affirm the Appellate Division. The interesting opinion of the latter court will be found in 5 App. Div. 354.

See also, *Borland v. Welch* (1900), 162 N. Y. 104, 110.—*Ed.*

² Appellant insisted, *inter alia*, that the certificate of deposit given by the Chemung Canal Bank to the deceased, Catherine Sullivan, was a valid contract between them, made for the benefit of the niece mentioned in it, and that she had the right to enforce that contract. *Buchanan v. Tilden*, 158 N. Y. 109; *Dutton v. Poole*, 1 Ventris, 318; *Todd v. Weber*, 95 N. Y. 181.

³ The arguments are omitted.

entitled to the moneys represented by said certificate. Upon the trial oral evidence was adduced to show, and the court found, that it was the intention of the plaintiff's intestate to have the said certificate of deposit so drawn that in case of her death, without having withdrawn the deposit, it could be drawn by the defendant. The trial court also found that "no attempt was made by the plaintiff's intestate to create a trust to exist during the life of the said intestate. Until her death the bank was her debtor." Defendant's father, whose real name was Brown, was a nephew of the plaintiff's intestate, and lived with her for thirty-six years, taking the name of Sullivan, and being regarded and treated as an adopted son, although no legal adoption was ever consummated. The defendant was born in the house of plaintiff's intestate, in Elmira, and lived there for four or five years after her birth, at the end of which period she removed with her parents to the city of Utica. Plaintiff's intestate, who was childless, exhibited and expressed on all occasions great fondness for the defendant, and at the time of said deposit stated to the teller of said bank that "she wanted it fixed to herself, or in case of her death to her niece, Catherine Sullivan, of Utica."

In asserting her claim to this fund the defendant invokes several distinct principles of law, the first of which is that the deposit of this money and the issuance of this certificate constituted a valid contract between plaintiff's intestate and the bank for the benefit of the defendant. *Buchanan v. Tilden*, 158 N. Y. 109; *Dutton v. Poole*, 1 Ventris, 318, and *Todd v. Weber*, 95 N. Y. 181, are cited in support of this contention. As I read these cases they have no application to the case at bar, for in each of them there was a valid contract founded upon a sufficient consideration for the benefit of a third person, which the latter could enforce. Here there was no contract to which the defendant was a privy, nor can it be said that the relations of the plaintiff's intestate and the defendant are such as to furnish any consideration for such a contract, if one had existed.¹

The judgment of the court below should be affirmed, without costs.

PARKER, CH. J., GRAY, BARTLETT, MARTIN, VANN, and CULLEN, JJ., concur.

Judgment affirmed.

¹ Part of the opinion, on another point, is omitted.

EMBLER *v.* HARTFORD STEAM BOILER INSURANCE
COMPANY.

COURT OF APPEALS OF NEW YORK, MARCH 21, 1899.

[158 *N. Y.* 431.]

Appeal from a judgment of the Appellate Division of the Supreme Court, upon an order affirming a judgment in favor of the defendants, entered upon a decision of the court dismissing the complaint upon the merits on trial at Special Term.

The nature of the action and the facts, as far as material, are stated in the opinion.

E. W. Douglas, J. Newton Fiero, and Francis A. Smith, for appellant.
Lewis E. Griffith, for respondents.¹

GRAY, J.—The policy of insurance, which was the subject of this action, was issued to the Ticonderoga Pulp & Paper Company in October, 1891, and it indemnified and insured, among other things, against loss or damage to property of every kind resulting from an explosion or rupture of steam boilers ;

"also against loss of human life or injury to person, whether to the assured, to employees, or to any other person or persons, caused by such explosion or rupture, payable to the assured for the benefit of the injured person or persons, or their legal representatives in case of death, and not contingent upon the legal liability of the assured."

The sum of insurance stated in the policy was \$50,000, and the amount of any recovery under the clause quoted was limited to the sum of \$5,000.

In December, 1892, Provencha, who was employed by the pulp company in the capacity of fireman, was injured as the result of an explosion of one of the boilers and died from his injuries. His widow, as his administratrix, brought an action against the pulp company, to recover damages by reason of its alleged negligence in causing the death of her intestate, and, prior to the trial of the issues therein raised, the case was settled by the payment of the sum of \$1,500. Subsequently, Provencha's administratrix assigned to the plaintiff in this action all her rights and interests in and to the policy of insurance in question ; whereupon this action was brought. The plaintiff seeks to enforce the contract of insurance to the extent of the \$5,000, provided for in the clause above mentioned.

It is contended on the part of the plaintiff that this policy provides for two kinds of insurance: one of indemnity to the pulp company,¹ against loss or damage to property, and one against loss of human life, or injury to persons ; and that the promise of the insurer in the latter

¹ The arguments are omitted.

respect, under the special clause which I have mentioned, was made absolutely for the benefit of Provencha, or his legal representatives in case of death, and not merely to indemnify the pulp company for any loss which it might sustain from, or by reason of, such death. It is argued that the manifest intent of the contract was to compensate, to a limited extent, those sustaining a loss from death, regardless of any relation existing between the assured and the person killed, and regardless of any interest which the assured might have in the person killed.

The policy of insurance was issued prior to the passage of the act of 1892, (Chap. 690, Sec. 55,) which expressly authorizes an employer to take out accident insurance covering his employees collectively, for the benefit of such as may be injured, and, therefore, is not affected by that law. The action must stand or fall upon the determination of the question whether the contract of insurance gave any rights to Provencha, or to his legal representatives, to enforce it against the insurer for his, or their, benefit.

Certainly, Provencha was not a party to the contract of insurance and it does not appear from the record, even, that he was an employee of the pulp company at the time the contract was made. The stipulated fact is, and it is all the evidence that we have on the subject, that Provencha on and prior to the day when the accident occurred, was in the employment of the Company. In the face of such a stipulation it is to be inferred, if not presumed, that Provencha was not an employee when the policy was issued. But, perhaps, that fact alone may not have a decisive bearing upon the question, if the theory of the plaintiff be tenable, that the promise of the insurer was made for the benefit of those who, being employees, might sustain injury. The difficulty in the way of maintaining the action upon any such theory is radical, in that Provencha was neither privy to the contract nor its consideration. It is not necessary to define precisely what was intended between the parties by the insertion of the clause in question. It may be that it was intended purely as an indemnity to the assured against pecuniary loss resulting to it from an injury occurring to an employee; whether that pecuniary loss were established as a legal liability of the assured, or whether it were a voluntary payment made to compensate the injured person on the part of the company.

Assuming that it intended an insurance of the employees through their employer, the case is not helped very much; because no right of action was given to the employee, nor could any cause of action exist at common law. It is, of course, competent for the legislature to alter the rules of the common law and to create a cause of action where none existed previously and that is what was attempted to be done by the legislature in the legislation of 1892, to which I have referred. But under the rules of the common law, giving a right of action upon the engagement or promise of a party, the cause of action is vested in the person with whom,

or to whom, the engagement or the promise is made. An exception is allowed in the case of a third party for whose benefit a contract is made; when he may be allowed to bring an action in his own name. In such a case, however, it must appear that, when the contract was made, some obligation, or duty, was owing from the promisee in the contract to the party to be benefited. It is not sufficient that the performance of the contract may benefit a third person. It must have been entered into for his benefit and the promisee must have a legal interest that it be performed in favor of the third person. *Vrooman v. Turner*, 69 N. Y. 280; *Durnherr v. Rau*, 135 N. Y. 219. It was said by Judge Rapallo in *Garnsey v. Rogers*, 47 N. Y. 233, when speaking of the doctrine of *Lawrence v. Fox*, 20 N. Y. 268, that he did not understand that that case went so far as to hold that every promise made by one person to another, from the performance of which a third person would derive a benefit, gives a right of action to such third party; he being privy neither to the contract nor to the consideration. Now what was there in the relation which Provencha sustained to the pulp company, which gave him a legal claim to the benefit of the promise of the insurer in this policy? If he had no legal claim, he could have no equitable claim; because a court of equity will not enforce a demand which is in contravention of rules of law. We do not know that he was an employee of the pulp company, at the time this contract of insurance was made. The only parties to the contract are the pulp company and the insurance company. It can not be supposed that there was an intention on the part of the pulp company to secure some benefit to Provencha; for he was not in its employment and he could in no respect be deemed in privity with the pulp company with respect to the contract. There was no relation of debtor and creditor; nor any obligation or duty owing from the pulp company to Provencha, affecting or concerning this contract. The only obligation or duty, as between them, consisted in such as grew out of the relation of employer and employee; for any breach of which the law gave a right of action and which was, in fact, availed of by Provencha's administratrix.

Nor can it be said that the pulp company had any legal interest that the promise of the insurer should be performed in favor of Provencha; for, assuming that a legal interest could have arisen upon the happening of the injury, it certainly ceased upon the satisfaction by the pulp company of the claim made in the action brought by his administratrix.

I think it is impossible for us to hold, under the circumstances, that there was such a relation between Provencha and the pulp company, or any such privity on his part to this contract of insurance, as conferred upon him, or his legal representatives, a right of action upon the policy of insurance and, for that reason, the judgment appealed from should be affirmed, with costs.

PARKER, CH. J., HAIGHT, MARTIN, and VANN, JJ., concur for affirmance upon the ground that the insurance policy in question was

at most intended as a pecuniary indemnity to the legal representatives of the deceased employee for the loss sustained by them in consequence of his death, and that but one recovery is permitted, whether the death was caused through negligence or unavoidable accident. A claim having been presented by the legal representatives against the assured, based upon negligence, and that claim having been recognized and paid, no further right of action could exist under the policy.

GRAY, J., reads for affirmance; all concur (PARKER, CH. J., HAIGHT, MARTIN, and VANN, JJ., in result on memorandum filed).

Judgment and order affirmed, with costs.

C. *The real party in interest when a chose in action is assigned.*

NOTE.

Whether a chose in action was assignable, and if assignable whether it could be enforced by the assignee in his own name, were questions which received very different answers, under the older procedure, according as they arose in an action at law or in a suit in equity. The ancient doctrine of the law courts, that no chose in action could be assigned, was indeed greatly relaxed as time went on, so that many legal choses in action became assignable in effect; but at its farthest the reach of the doctrine at law on this point fell short of that which was developed in equity.

For instance, courts of law would not recognize the assignment of a part of an entire debt, without the assent of the debtor; but such an assignment was recognized and sustained in courts of equity.¹ So also "to make an assignment valid at law, the thing which is the subject of it must have an actual or potential existence at the time of the grant or assignment; but courts of equity will support assignments not only of choses in action and of contingent interests and expectancies but also of things which have no present actual or potential existence but rest in mere possibility—not indeed as a present positive transfer operative *in presenti*, for that can only be of a thing *in esse*, but as a present contract, to take effect and attach as soon as the thing comes *in esse*."²

Moreover, even when the courts of law recognized the assignment of a chose in action, they as a rule recognized it only indirectly; the assignee was required to sue in the name of the assignor, save where the law merchant or some special statute had established an exception.³ Equity, on the other hand, required that the assignee of an assignable chose in action should sue in his own name.⁴

With the amalgamation of law and equity, under the one form of civil action, it became necessary to adopt a principle that would remove this conflict. The American codes met it in a very general way. They were not explicit either on the assignability of choses in action or on the right of an assignee always to sue in his own name. The question of assignability was left to inference from provisions in the substantive

¹ See *Mandeville v. Welch* (1820), 5 Wheat. 277, 286. *James v. City of Newton* (1886), 142 Mass. 366, 371. Compare *Grain v. Aldrich* (1869), 38 Cal. 514, 521, given in text, *ante*, p. 43.

² Story's Equity Jurisprudence, § 1040.

³ These special statutory exceptions had grown to a considerable number before the enactment of the New York Code of 1848; compare Chitty's *Pleading*, 10th American edition (1847), 15, 16.

⁴ "If at this moment, any member of the legislature, to whom a bond and mortgage had been assigned, were to go into the supreme court and sue upon the bond, he would have to sue in the name of the person who made the assignment, however much distrusted, or lose his case; but if he were to sue on the mortgage, for the foreclosure, he would have to sue in his own name, or he would not be heard. And yet it is the same judge who sits in the two cases." First Report, New York Commissioners, (1848), p. 124.

law, largely to its provisions respecting the survivability of choses in action. The right of the assignee to sue in his own name was left to inference from the general provision that every civil action must be brought in the name of the real party in interest, except when otherwise specially provided. Is the assignee of a chose in action always the real party in interest, within the meaning of the codes, whenever his right to sue would have been recognized at law (as in the case of the assignment of a negotiable instrument) or in equity? Is the assignor of a chose in action ever the real party in interest, especially when he has retained, wholly or in part, the beneficial interest in the thing assigned?¹

The cases on the questions thus arising will be arranged under the following heads:

I. What choses in action are assignable,

1. Among rights in contract.
2. Among rights in tort.

II. Nature of the objection that one suing on an assigned chose in action is not the real party in interest.

III. The real party in interest when the assignment of the chose in action is absolute.

IV. The real party in interest when the assignment of the chose in action is subject to a condition, expressed on the face of the assignment or in a collateral agreement.

¹ The provision of the English code, while more explicit on this point than the American codes, has apparently a less extensive scope. "There being this conflict between law and equity, a provision, curiously limited, was inserted in the Judicature Act of 1873, which did not wholly supersede the common law, nor establish the equitable procedure, but which created a *tertium quid*:

"Sec. 25, subs. 6.—'Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee, if this act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor; provided always, that if the debtor, trustee, or other person liable in respect of such debt, or chose in action, shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice, under and in conformity with the provisions of the Acts for the relief of trustees.'

"This section . . . makes nothing an assignment which was not an assignment before (*Schroeder v. The Central Bank*, 1876, 24 W. R. 710; 34 L. T. 735). On the other hand many an assignment which was valid in equity before the Judicature Act is not within the scope of this section, and is therefore still invalid in law and can only be enforced in the manner usual in courts of equity before the Act, *i. e.*, the assignor must still be joined, either as a plaintiff or a defendant (see *Turquand v. Fearon*, 1879, 4 Q. B. D. 280). And in cases which do fall within the section, all former equities remain unaffected; the assignee has the benefit of a new procedure at law; but none of the rights of the debtor or of the assignor are restricted or destroyed (*Hudson v. Fernyhough*, 1889, 61 L. T. 722; and see the judgment of A. L. SMITH, J., in *Walker v. Bradford Old Bank*, 1884, 12 Q. B. D. 517).

"The distinctions between assignments within the section and those outside it should be carefully noted, so that the plaintiff may know which procedure to adopt." Mr. W. Blake Odgers, in 1 *Ency. Laws of England*, 354.

I. WHAT CHUSES IN ACTION ARE ASSIGNABLE.

1. *Among rights in contract.*SHARP *v.* EDGAR,

SUPERIOR COURT OF THE CITY OF NEW YORK, DECEMBER 15, 1849.

[3 *Sandf.* 379.]

This was an action brought after the code took effect, for the recovery of a payment due upon a contract, with one Lewis B. Griffin, and assigned by him to Sharp, the plaintiff.

The complaints alleged that in August, 1848, the defendant and several others, owners of Pier No. 11, North River, made a contract with Griffin by which Griffin agreed to perform certain work in sheathing and extending the pier, and furnishing the necessary materials, in accordance with certain plans and specifications, for the sum of \$8670; that the contract provided for payments from time to time, upon the production of the superintendent's certificates, each of the parties to be liable only for the payment of his proportion of the sum agreed to be paid, according to his interest in the pier; that on September 4, 1848, Griffin duly assigned to the plaintiff, by an instrument under his hand and seal, all payments due, or to become due, upon the contract, and that notice of the assignment was thereupon given to the defendant; that Griffin proceeded, and complied with the contract on his part, and performed the work stipulated for. The complaint further alleged that the superintendent's certificate was given December 12, 1848, by which the second payment became due, and that the proportion due from the defendant, in respect to his interest in the pier, was \$359.70, which had been demanded and was refused.

The answer admitted the making of the contract, and alleged that a paper, purporting to be an assignment made by Griffin, was shown to the defendant; that whether it was a valid assignment or not, or whether an assignment of the whole or part of the payment, the defendant was ignorant; that he did not recognize the paper as a notice binding on him; that when the first payment upon the contract became due, the defendant deposited his proportion in the hands of the superintendent, to be paid when called for; that the same was paid upon the order of Griffin, the order being made payable to plaintiff; that the second payment was paid by the superintendent to Griffin in person, upon his request, and on the production of the proper certificate, which payment, it was insisted, was valid and legal, and a bar to the claim of the plaintiff.

The cause came on for trial before VANDERPOEL, J. After proof of the contract, the plaintiff read in evidence the assignment from Griffin to the plaintiff, duly acknowledged and recorded, December 28, 1848.

It appeared that notice of the assignment to plaintiff was given to the defendant, September 25, 1848, and that he was notified not to make any more payments to Griffin; that the defendant read the assignment, and told the party giving the notice that he had better see the superintendent; that accordingly, two or three days afterward, notice in like manner was given to the superintendent. It appeared on the part of the defendant, by the testimony of the superintendent, that he was called on by the plaintiff for the first payment; that the plaintiff demanded payment as assignee; that the witness declined paying him without a written order from Griffin, which was subsequently furnished, dated November 1, 1848, made payable to the plaintiff; and that the first payment was made upon this order. It was also proved that the third payment was made in like manner, by Griffin's order, dated January 12, 1849; and that in all cases the certificate was made out in Griffin's name, and given to him.

The court charged the jury that the contract was assignable, and that a compliance with the request for an order was not a waiver of the notice given to the defendant.

The jury found for the plaintiff for the amount claimed, on which a judgment was entered, and the defendant appealed.

Gerard W. Morris, for the defendant.

D. D. Field, for the plaintiff.¹

By the Court. VANDERPOEL, J.—The defendant resists the plaintiff's right to recover, on the ground that the contract was not assignable.

Section 111 of the code of procedure provides, that every action must be prosecuted in the name of the *real party* in interest, and if the cause of action here was assignable, it was competent for the plaintiff to maintain the action. It is a general rule, that all choses in action may be assigned in equity, and the assignee has an equitable right, which he may enforce in the name of the assignor, *Bac. Abr.*, Title "*Assignment*" A; *Wheeler v. Wheeler*, 9 Cow. 34; *Eastman v. Wright*, 6 Pick. 316. The provision of the code renders the intervention of a court of equity now unnecessary, as the assignee, who is the party in interest, may bring a suit directly in his own name.

The defendant contends that this is a personal contract, depending upon the skill, honesty, and integrity of the one party, and the responsibility of the other, and therefore can not be assigned. If there be any force in this position as an abstract proposition, an abundant answer to it here is, that nothing is assigned but the *payments* on the contract. These payments, of course, must be earned by Griffin, before any right of action can accrue in his favor, or in favor of the plaintiff. Griffin is not, by virtue of the assignment, exonerated and discharged from the burthen imposed upon him by the contract. He must perform the work, according to the contract, before any liability can be raised

¹ The arguments are omitted.

from the defendants to any one. The defendants maintain unimpaired all their right to the skill, honesty, and integrity of the assignor, notwithstanding the assignment. The want of skill of Sharp, the plaintiff, is not substituted for the skill of Griffin, which the defendants contend may, with them, have been the principal inducement to this contract.

There are contracts imposing a mere personal trust upon a party, which are not assignable. The cases of *Hall v. Gardiner*, 1 Mass. 172, and *Davis v. Coburn*, 8 Mass. 299, exemplify this principle. In both these cases, it was held that an indenture of apprenticeship is not assignable by the master, because he has a mere personal trust. So where a party by assignment does an act which is tantamount to saying that he will not perform *his* part of a contract, not yet executed, he can not, by assigning, impose upon the other party the obligation of performing to the assignee. *Robson v. Drummond*, 2 Barn. & Adol. 303, was a case of this description, where, A., a coachmaker, entered into an agreement to furnish B. with a carriage, for the term of five years, at seventy-five guineas a year. Before the expiration of the first three years, A. assigned all his interest in the business and in the contract in question to C., and the business was afterward carried on by C. alone. The assignee brought an action for the two payments, which, according to the terms of the contract, would become due during the last two years of its continuance. It was held that the action was not maintainable; that A., by transferring all his interest in the establishment to C., had become incapable of performing his part of the contract. The party with whom the defendant originally contracted having placed himself in a position where he could not perform *his* part of the contract, the defendant was justly held to be discharged. That is not like the present case. Here, Griffin, by assigning the payments, did not disable himself from performing the service, which was a condition precedent to the defendant's liability.

There is another class of cases, in which assignments will not be upheld, either in equity or at law, as being against the principles of public policy. 1 Story Eq. Jur. § 1040, d. p. 395. An officer in the army will not be allowed to pledge or assign his commission by way of mortgage, for his commission is an honorary personal trust. In like manner, the profits of a public office would seem, upon a similar ground of public policy, not to be assignable. *Palmer v. Bate*, 2 Brod. & Bing, 673; *Davis v. Duke of Marlborough*, 1 Swanst. 79. It has been questioned by some jurists, whether pensions from the government are assignable. 1 Story Eq. Jur. p. 397. But in England they are, under certain circumstances, held now to be assignable. *Wills v. Foster*, 8 M. & W. 149. *Ex parte Battine*, 4 Barn. & Adolp. 690.

We do not consider this case as coming within the principles of any of the cases in which contracts or choses in action have been held not to be assignable; and the plaintiff here is entitled to recover.

Motion for new trial denied.

HOOKER v. EAGLE BANK OF ROCHESTER.

COURT OF APPEALS OF NEW YORK, JANUARY, 1864.

[30 N. Y. 83.]

In April, 1854, the defendant owned a lot of land in the city of Rochester, the buildings on which had been destroyed by fire. Defendant intended to erect on this lot a new building, in a part of which its banking house was to be located. Kauffman & Bissel, the assignors of plaintiff's claim, were a firm of architects, in Rochester at this time; and Bissel had entered into a contract with the defendant for the purchase of a part of the premises on which the defendant was to erect a new building, but this agreement was rescinded before the transactions hereinafter mentioned. Kauffman & Bissel prepared plans and specifications for the new building, under a contract, as is alleged in the complaint, with the defendant to furnish the same and superintend the work, for the sum of \$1,000. The excavation of the cellar and construction of a sewer on the premises were let to one Potter, who had entered into a contract for the work, and he performed work according to the plans and specifications furnished by Kauffman & Bissel, and was paid upon estimates made by them.

In the spring of 1855 the bank sold the premises to one Chappel, who assumed the contract with Potter, and agreed to pay a small sum to one Austin, an architect, for work done in reference to the building, and also to pay Kauffman & Bissel a sum for like services not then liquidated, not exceeding, however, \$50. Chappel dismissed Kauffman & Bissel, and employed another architect, although they were, as they allege, ready and willing to go on with the work.

The complaint contained two causes of action; one on a special contract to pay \$1,000 for the services to be rendered by Kauffman & Bissel the other on a *quantum meruit*. The assignment to the plaintiff from Kauffman & Bissel was not in writing, and evidence of the assignment was objected to on that ground.

On the trial, evidence was given on the part of the plaintiff, who was assignee of the demand from Kauffman & Bissel, tending to prove an agreement by the defendant, through its president and two other officers, to employ and pay Kauffman & Bissel for preparing plans, &c., \$1,000; and on the part of the bank, tending to show that no such agreement was made. It was shown that at the time when Kauffman & Bissel were dismissed one-half of the work was done.

The defendant moved for a non-suit on the grounds: 1st. That no cause of action had been proved. 2nd. That neither of the issues had been proved. 3rd. That the assignment to the plaintiff was not in

writing, and therefore was invalid. The motion was denied and the defendant's counsel excepted. . . .¹

The jury found for the plaintiff \$500, for which sum judgment was rendered, and the same was affirmed at a general term of the supreme court. The defendant appealed.

———, for the appellant.

T. C. Montgomery, for the respondent.

MULL'N, J.—Proof was given, on the trial, tending to prove an express contract by the defendant to employ Kauffman & Bissel as architects to make plans, &c., for the new building, and to pay them therefor the sum of \$1,000. The jury, by finding for the plaintiff \$500 only, must have found that there was no express promise to pay Kauffman & Bissel \$1,000, but they have found an agreement to employ them; that they, Kauffman & Bissel, have performed services for the defendant, and that such services are reasonably worth \$500. It is not necessary, in order to charge a corporation for services rendered, that the directors, at a formal meeting, should either have formally authorized or ratified the employment. For many purposes the officers and agents of the corporation may employ persons to perform services for it, and such employment, being within the scope of the agent or officers' duty binds the corporation. In other cases, if an officer employs a person to perform a service for the corporation, and it is performed with the knowledge of the directors and they receive the benefit of such service without objection, the corporation is liable upon an implied *assumpsit*.²

There was sufficient evidence to authorize the verdict. . . .

The defendant moved for a non-suit on several grounds, all of which are disposed of by the legal propositions above advanced except one, and that is, that the assignment from Kauffman & Bissel to the plaintiff, being without writing, was void.

A chose in action might at law be assigned without writing, so as to enable the assignee to enforce the debt or demand assigned in the name of the assignor, if there was a valuable consideration and the delivery of the thing assigned.³ Such an assignment in equity, enabled the assignee to sue in his own name.

A book debt is a chose in action and assignable; *Dix v. Cobb*, 4 Mass. 508; and may like any other chose in action, be assigned by parol.⁴

¹ Part of the reporter's statement is omitted.

² *Citing*, *Danforth v. Schoharie Turnpike Co.*, 12 Johns. 227; *Dunn v. Rector of St. Andrews*, 14 id. 118; *Long Island Railroad Co. v. Marquand*, 6 Legal Obs. 160; *Fiester v. LaRue*, 15 Barb. 323; 7 Cowen, 540; 9 Paige, 496; 17 N. Y. 449; 22 Wend. 348; 20 Wend. 91; 4 Cow. 645; *Angel & Ames on Corp.*, §§ 7, 8.

³ *Citing*, *Ford v. Stuart*, 19 Johns. 342; *Briggs v. Dorr*, 19 id. 95; *Prescott v. Hall*, 17 id. 284.

⁴ *Citing*, *Jones v. Witter*, 13 Mass. 304; *Briggs v. Dorr*, 19 Johns. 95; 2 Cases in Chancery, 7, 37; *Dunn v. Sell*, 15 Mass. 485.

Under the code, an assignment valid as an equitable assignment is equally valid at law. (Code, § 111).¹

All the judges concurring,

*Judgment affirmed.*²

WHITMAN ET AL. v. KEITH ET AL.

SUPREME COURT OF OHIO, DECEMBER TERM, 1868.

[18 O. S. 134.]

Error to the court of common pleas of Cuyahoga county. Reserved in the district court.

In September, 1856, one George A. Howe brought a civil action in the court of common pleas of Cuyahoga county, against one William E. Cornwall, seeking to recover the value of a certain draft or bill of exchange drawn by one Byers, which, as he averred, had been received for him by Cornwall, while in his employment, and which Cornwall had fraudulently converted to his own use.

Having made the necessary affidavits, he procured an order of attachment against Cornwall, and garnishee process against the firm of Whitman, Standart & Co., under which name the plaintiffs in error were doing business as bankers.

This process was served on the firm by leaving a true copy thereof at its usual place of business, with Stephen H. Standart, he being in charge of the office. Stephen H. Standart was not a member of the

¹ Part of the opinion is omitted.

² In *Seymour v. Aultman & Co.* (1899), — Iowa, —, 80 N. W. 401, the plaintiffs sued to recover commissions alleged to be due from defendants to Parks Bros., and orally assigned by the latter to plaintiff. Said the court, per DEEMER, J.: "It is insisted that the verbal assignment of a chose in action is invalid. Such was the holding of this court under the provisions of section 952 of the code of 1851. See *Andrews v. Brown*, 1 Iowa, 154; *Beebe v. Funkhouser*, 2 Iowa, 314; *Williams v. Soutter*, 7 Iowa, 435. And although there has been no substantial change in the wording of the statute, the later cases all hold that a verbal assignment is good. *Conyngham v. Smith*, 16 Iowa, 471; *Moore v. Lowrey*, 25 Iowa, 336; *Barthol v. Blakin*, 34 Iowa, 452; *McWilliams v. Webb*, 32 Iowa, 577; *Hoffman v. Smith*, 94 Iowa, 498, 63 N. W. 182; *Foster v. Trenary*, 65 Iowa, 622, 22 N. W. 898; *Melcalf v. Kincaid*, 87 Iowa, 443, 54 N. W. 867; *Howe v. Jones*, 57 Iowa, 140, 8 N. W. 451, 10 N. W. 299. And while none of these later cases expressly overruled the former ones, yet such is their effect.

"We are asked to say, however, that the earlier decision announces the correct rule, and that a chose in action can not be assigned by parol. This we are not prepared to do. The great weight of reason and authority favors the proposition that such an assignment may be by parol. See cases cited in 2 Am. & Eng. Enc. Law (2d. Ed.), pp. 1056, 1058."

Accord also, *Tone v. Shankland* (1900), — Iowa —, 81 N. W. 789; *Roberts v. First National Bank* (1899), — N. D. —, 79 N. W. 993; *Will v. Huffmann* (1899), — W. Va., — 33 S. E. 279; *Perkins v. Peterson* (1892), 2 Colo. App. 242; *Rice v. Yakima Railway* (1892), 4 Wash. 724; *Clegg v. New York Newspaper Union* (1893), 72 Hun, 395; *Riker v. Curtis* (1896), 39 N. Y. Supp. 340; S. C., 17 Misc. 134, 137: "No formality is necessary to effect the transfer of a chose in action. Any transaction between the contracting parties which indicated their intention to pass the beneficial interest in the right from one to the other is sufficient for that purpose. A debt or claim may be assigned by parol as well as by writing."—*Per McADAM, J.—Ed.*

firm; but Charles W. Standart, one of the partners, subsequently appeared with an attorney retained by him on behalf of the firm, before a commissioner appointed by the court for that purpose, and without objection answered to the process by submitting to an examination touching the alleged property of Cornwall in possession of the firm, and the alleged indebtedness of the firm to Cornwall. . . .

Howe recovered a judgment in his action against Cornwall, in May, 1858, for the sum of \$1,442.83 and costs.

This judgment remaining wholly unpaid, the defendants in error, as the assignees thereof, commenced the original action in this case, in January, 1859, under section 218 of the code,¹ seeking to subject the plaintiffs in error, who are the members of said firm, to liability, by reason of the alleged unsatisfactory and untrue character of the answer of the firm, as such garnishee, and to recover a judgment against the plaintiffs in error, individually, for the amount of the property and credits of Cornwall in the possession of the firm at the time when it was so garnisheed.

The petition in the court below alleged that the answer of the firm in the garnishee proceeding was untrue, in averring that the firm was not indebted to Cornwall and had none of his property under its control, when in fact it was so indebted, and had the control of such property to the amount of \$1,400.

The defendants demurred to this petition, on the grounds: 1. That the action should have been brought in the name of George A. Howe, the plaintiff in attachment, and could not be maintained in the name of his assignees, the present plaintiffs; 2. That the action should have been brought against the firm by its firm name, and not against the members of the firm individually; and 3. That the petition does not state facts sufficient to constitute a cause of action. The demurrer was overruled by the court.

Moses Kelley, and Prentiss & Baldwin, for plaintiffs in error.

Keith & Coon, in person.²

SCOTT, J.—The first question raised by the assignments of error in this case is: Did the court below err in overruling the demurrer to the plaintiff's petition? This demurrer, it is said, should have been sustained for several reasons.

1. It is claimed that the action should have been brought by Howe, the plaintiff in attachment, and could not be maintained in the name of his assignees.

The right of action against a garnishee, given by section 218 of the code, was intended as a means of procuring satisfaction of the attaching creditor's claim. It is incidental to, and inseparable from, the owner-

¹ Enacting that if a garnishee appear and answer and his disclosure be not satisfactory to the plaintiff . . . the plaintiff may proceed against him by an action. Same enactment in Ohio Revised Stats., §§ 5551, 5552.

² The arguments are omitted.

ship of such claim, and by the assignment of the claim passes to the assignee. The general rule of the code, established by section 25, is that "every action must be prosecuted in the name of the real party in interest," and the only exceptions to that rule are to found in section 27. None of them relates to the case of assignments. But section 26 provides that, "in the case of an assignment of a thing in action, the action *by the assignee* shall be without prejudice," etc., clearly implying that the action is to be brought by the assignee. Where at common law an assignment of a chose in action would pass only the equitable title, it is the policy of the code to vest in the assignee the legal title, and consequent right of action in his own name. . . .¹

DAY, C. J., and BRINKERHOFF, WELCH, and WHITE, J.J., concurred.
*Judgment affirmed.*²

ARKANSAS VALLEY SMELTING COMPANY v. BELDEN
 MINING COMPANY.

SUPREME COURT OF THE UNITED STATES, MAY 14, 1888.

[127 U. S. 379.]

This was an action brought by a smelting company, incorporated by the laws of Missouri, against a mining company, incorporated by the laws of Maine, and both doing business in Colorado by virtue of a compliance with its laws, to recover damages for the breach of a con-

¹ Only so much of the opinion is given as relates to the one point.

² See also, *Sibley v. County of Pine* (1883), 31 Minn. 201: The lien of an attorney for his compensation upon a judgment is assignable. *Kinney v. Duluth Ore Co.* (1894), 58 Minn. 455: The proper transfer of a claim the payment of which may be enforced under the mechanic's lien law (Minnesota laws of 1889, ch. 200), operates in Minnesota as the assignment of the right to a lien, including the right of the transferee to file the lien statement in his own name. *The Victorian Number Two* (1894), 26 Ore. 194 (reviewing authorities on the assignability of mechanics' liens). *Duncan v. Hawn* (1894), 104 Cal. 10: "There is a conflict in authority from other states as to whether statutory liens of the class created by the act in question pass by assignment of the debt; some of the authorities holding that it is strictly a personal right and dies unless asserted in the hands of the one for whose benefit it is primarily given; while other cases hold in effect that being given as security for the performance of the obligation, it becomes an incident which follows it upon assignment.

"Whatever may be the rule in other states, in the absence of statutory regulation, it would seem that the code solves the question here presented. Section 2909 of the Civil Code, speaking on the subject of liens in general, declares that 'a lien is to be deemed accessory to the act for the performance of which it is security'; and section 1084 of the same code, relating to the effect of transfer, provides that: 'The transfer of a thing transfers also all its incidents, unless expressly excepted.' The language of section 2909 may be taken as referring to perfected and subsisting liens."—*Per VAN FLEET, J.* It was accordingly held that the assignee of the claims of certain laborers who had performed work of the character contemplated in a California statute, on the threshing-machine of the defendants, could sue to enforce and foreclose a lien for the value of this labor.

Compare *Mills v. La Verne Co.* (1893), 97 Cal. 254, and *Rauer v. Fay* (1895), 110 Cal. 361, 367: "A perfected lien may be assigned, or rather it passes with an assignment of the demand for which it stands as security. The mere right to take a lien in the present or future is not assignable."—*Per SEARLS, C.—Ed.*

tract to deliver ore, made by the defendant with Billing and Eilers, and assigned to the plaintiff. The material allegations of the complaint were as follows :

On July 12, 1881, a contract in writing was made between the defendant of the first part and Billing and Eilers of the second part, by which it was agreed that the defendant should sell and deliver to Billing and Eilers at their smelting works in Leadville ten thousand tons of carbonate lead ore from its mines at Red Cliff, at the rate of at least fifty tons a day, beginning upon the completion of a railroad from Leadville to Red Cliff, and continuing until the whole should have been delivered, and that "all ore so delivered shall at once upon the delivery thereof become the property of the second party;" and it was further agreed as follows :

"The value of said ore and the price to be paid therefor shall be fixed in lots of about one hundred tons each; that is to say, as soon as such a lot of ore shall have been delivered to said second party, it shall be sampled at the works of said second party, and the sample assayed by either or both of the parties hereto, and the value of such lots of ore shall be fixed by such assay; in case the parties hereto can not agree as to such assay, they shall agree upon some third disinterested and competent party, whose assay shall be final. The price to be paid by said second party for such lot of ore shall be fixed on the basis hereinafter agreed upon by the closing New York quotations for silver and common lead, on the day of the delivery of sample bottle, and so on until all of said ore shall have been delivered.

"Said second party shall pay said first party at said Leadville for each such lot of ore at once, upon the determination of its assay value, at the following prices," specifying, by reference to the New York quotations, the price to be paid per pound for the lead contained in the ore, and the price to be paid for the silver contained in each ton of ore, varying according to the proportions of silica and of iron in the ore."

The complaint further alleged that the railroad was completed on November 30, 1881, and thereupon the defendant, under and in compliance with the contract, began to deliver ore to Billing and Eilers at their smelting works, and delivered 167 tons between that date and January 1, 1882, when "the said firm of Billing and Eilers was dissolved, and the said contract and the business of said firm, and the smelting works at which said ores were to be delivered, were sold, assigned, and transferred to G. Billing, whereof the defendant had due notice;" that after such transfer and assignment the defendant continued to deliver ore under the contract, and between January 1, and April 21, 1882, delivered to Billing at said smelting works 894 tons; that on May 1, 1882, the contract, together with the smelting works, were sold and conveyed by Billing to the plaintiff, whereof the defendant had due notice; that the defendant then ceased to deliver ore under the contract, and afterwards refused to perform the contract, and gave notice to the plaintiff that it considered the contract

cancelled and annulled ; that all the ore so delivered under the contract was paid for according to its terms ; that " the plaintiff and its assignors were at all times during their respective ownerships ready, able, and willing to pay on the like terms for each lot as delivered, when and as the defendant should deliver the same, according to the terms of said contract, and the time of payment was fixed on the day of delivery of the 'sample bottle,' by which expression was, by the custom of the trade, intended the completion of the assay or test by which the value of the ore was definitely fixed ;" and that " the said Billing and Eilers, and the said G. Billing, their successor and assignee, at all times since the delivery of said contract, and during the respective periods when it was held by them respectively, were able, ready and willing to and did comply with and perform all the terms of the same, so far as they were by said contract required ; and the said plaintiff has been at all times able, ready, and willing to perform and comply with the terms thereof, and has from time to time, since the said contract was assigned to it, so notified the defendant."

The defendant demurred to the complaint for various reasons, one of which was that the contract therein set forth could not be assigned, but was personal in its nature, and could not, by the pretended assignment thereof to the plaintiff, vest the plaintiff with any power to sue the defendant for the alleged breach of contract.

The circuit court sustained the demurrer, and gave judgment for the defendant ; and the plaintiff sued out this writ of error.

Mr. R. S. Morrison, Mr. T. M. Patterson, and Mr. C. S. Thomas, for plaintiff in error.¹

¹ On behalf of the plaintiff in error, the following points, among others, were submitted: " This is an executory contract. The rule as to the assignability of such instruments is that all contracts may be assigned, either before or after the breach, which were not entered into upon the one side or the other upon the basis of a personal trust in the peculiar fitness of the other party to perform his part. The illustration so often used is that of an author to write a book; or an artist to paint a picture; neither of which can be assigned on the part of the person whose genius is depended upon. But an agreement to pay \$1,000 for a valuable consideration, or to deliver ten tons of coal at so much per ton, can not belong to this class of cases, as in either instance it can make no difference to either party who executes the other part of the contract. Where taste, skill, or genius is one of the elements relied upon, the contract can not be assigned; where it is only a question of so much lost or so much gained, whoever performs the contract, it may be assigned.

" To which class does the contract in the case at bar belong? Reduced to its elements the contract amounts to no more than an agreement on the one side to sell ten thousand tons of ore, and on the other to receive and pay for the same. It makes no difference to the one party who gives him the ore, nor to the other who pays him the price; all that both parties want is what they have contracted to get. No peculiar fitness on either side is needed to fulfill the contract, and, in point of fact, the contract is one which from its very nature has to be performed largely through the medium of agents. The contract is no more nor less than an article of property to each party, and the policy of the law is to let such articles of property pass from hand to hand with as much freedom as is requisite to make them valuable.

" While all the cases lay down the rule as we have above stated, the New York Court of Appeals in *Devlin v. Mayor*, 63 N. Y. 8, 16, has given us a criterion by which we can the more readily bring the present case within the terms of the rule. This criterion is, that whatever contracts are binding upon the executors or administrators may be assigned, while those that die with the person can not be assigned. While it is true that in both instances we must

No appearance for defendant in error.

MR. JUSTICE GRAY, after stating the case as above reported, delivered the opinion of the court.

If the assignment to the plaintiff of the contract sued on was valid, the plaintiff is the real party in interest, and as such entitled, under the practise in Colorado, to maintain the action in his own name.¹ The vital question in the case, therefore, is whether the contract between the defendant and Billing and Eilers was assignable by the latter, under the circumstances stated in the complaint.

At the present day, no doubt, an agreement to pay money, or to deliver goods, may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something afterwards to be done by him or by some other stipulation, which manifests the intention of the parties that it shall not be assignable.

But everyone has a right to select and determine with whom he will contract, and can not have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, "You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract."²

The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise. "Rights arising out of contract can not be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." Pollock on Contracts (4th ed.) 425.

The contract here sued on was one by which the defendant agreed to deliver ten thousand tons of lead ore from its mines to Billing and Eilers at their smelting works. The ore was to be delivered at the rate

go back to the principle of personal skill, taste, or genius, as the real test, the fact that this has been the test so far as executors and administrators are concerned for centuries of the common law, will make it much easier to apply in the matter of the assignability of contracts. So that all the cases deciding the question of the liability or rights of the executor or administrator upon executory contracts of the decedent, can be quoted as applicable to the question of the assignability of contracts. . . .

"The American authorities are, if it were possible, much stronger upon the side of the assignability than are the English. No state has rendered a greater number of decisions, and all to the same end, on this question than New York; and in view of her great commercial power, no state should be listened to with more respect. *Devlin v. Mayor*, 63 N. Y. 8; *Sears v. Conover*, 3 Keyes, 113; *Tyler v. Barrows*, 6 Robertson (N. Y.), 104; *Horner v. Wood*, 23 N. Y. 350. See, also, in reports of other states, *Taylor v. Palmer*, 31 Cal. 240; *Parsons v. Woodward*, 22 N. J. L. (2 Zabriskie) 196; *Philadelphia v. Lockhardt*, 73 Penn. St. 211; *Lafferty v. Rutherford*, 5 Ark. 453; *St. Louis v. Clemens*, 42 Mo. 69; *Groot v. Story*, 41 Vt. 533.

"The reports show us many cases in which contracts have been held to be personal and not assignable; but the majority are clearly on the other side of the line."

¹ *Citing*, Rev. Stat., § 914; (See Practice Conformity Act, *infra*); Colorado Code of Civil Procedure, § 3; *Albany & Rensselaer Co. v. Lundberg*, 121 U. S. 451; *ante*, p. 198.

² *Citing*, *Humble v. Hunter*, 12 Q. B. 310, 317; *Winchester v. Howard*, 97 Mass. 303, 305; *Boston Ice Co. v. Potter*, 123 Mass. 28; *King v. Batterson*, 13 R. I. 117, 120; *Launsden v. McCarthy*, 45 Mo. 106.

of fifty tons a day, and it was expressly agreed that it should become the property of Billing and Eilers as soon as delivered. The price was not fixed by the contract, or payable upon the delivery of the ore. But, as often as a hundred tons of ore has been delivered, the ore was to be assayed by the parties or one of them, and, if they could not agree, by an umpire; and it was only after all this had been done, and according to the result of the assay, and the proportions of lead, silver, silica and iron, thereby proved to be in the ore, that the price was to be ascertained and paid. During the time that must elapse between the delivery of the ore, and the ascertainment and the payment of the price, the defendant had no security for its payment, except in the character and solvency of Billing and Eilers. The defendant, therefore, could not be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom it had contracted.

The fact that upon the dissolution of the firm of Billing and Eilers, and the transfer by Eilers to Billing of this contract, together with the smelting works and the business of the partnership, the defendant continued to deliver ore to Billing according to the contract, did not oblige the defendant to deliver ore to a stranger, to whom Billing had undertaken, without the defendant's consent, to assign the contract. The change in a partnership by the coming in or the withdrawal of a partner might perhaps be held to be within the contemplation of the parties originally contracting; but, however that may be, an assent to such a change in the one party can not estop the other to deny the validity of a subsequent assignment of the whole contract to a stranger. The technical rule of law, recognized in *Murray v. Harway*, 56 N. Y. 337, cited for the plaintiff, by which a lessee's express covenant not to assign has been held to be wholly determined by one assignment with the lessor's consent, has no application to this case.

The cause of action set forth in the complaint is not for any failure to deliver ore to Billing before his assignment to the plaintiff, (which might perhaps be an assignable chose in action,) but it is for a refusal to deliver ore to the plaintiff since this assignment. Performance and readiness to perform by the plaintiff and its assignors, during the periods for which they respectively held the contract, is all that is alleged; there is no allegation that Billing is ready to pay for any ore delivered to the plaintiff. In short, the plaintiff undertakes to step into the shoes of Billing, and to substitute its liability for his. The defendant had a perfect right to decline to assent to this, and to refuse to recognize a party, with whom it had never contracted, as entitled to demand further deliveries of ore.

The cases cited in the careful brief to the plaintiff's counsel, as tending to support this action, are distinguishable from the case at bar, and the principal ones may be classified as follows:

First. Cases of agreements to sell and deliver goods for a fixed price, payable in cash on delivery, in which the owner would receive

the price at the time of parting with his property, nothing further would remain to be done by the purchaser, and the rights of the seller could not be affected by the question whether the price was paid by the person with whom he originally contracted or by an assignee.¹

Second. Cases upon the question how far executors succeed to rights and liabilities under a contract of their testator.²

Assignment by operation of law, as in the case of an executor, is quite different from assignment by act of the party; and the one might be held to have been in the contemplation of the parties to this contract although the other was not. A lease, for instance, even if containing an express covenant against assignment by the lessee, passes to his executor. And it is by no means clear that an executor would be bound to perform, or would be entitled to the benefit of, such a contract as that now in question. *Dickinson v. Calahan*, 19 Penn. St. 227.

Third. Cases of assignment by contractors for public works, in which the contracts, and the statutes under which they were made, were held to permit all persons to bid for the contracts, and to execute them through third persons.³

Fourth. Other cases of contracts assigned by the party who was to do certain work, not by the party who was to pay for it, and in which the question was whether the work was of such a nature that it was intended to be performed by the original contractor only.⁴

Without considering whether all the cases cited were well decided, it is sufficient to say that none of them can control the decision of the present case.

Judgment affirmed.

¹ *Citing*, *Sears v. Conover*, 3 Keyes, 113, and 4 Abbott (N. Y. App.), 179; *Tyler v. Barrows*, 6 Robertson (N. Y.), 104.

² *Citing*, *Hambly v. Trott*, Cowper, 371, 375; *Wentworth v. Cock*, 10 Ad. & El. 42 and 2 Per. & Dav. 251; *Williamson Executors* (7th ed.), 1723-1725.

³ *Citing*, *Taylor v. Palmer*, 31 Cal. 240, 247; *St. Louis v. Clemens*, 42 Mo. 69; *Philadelphia v. Lockhardt*, 73 Penn. St. 211; *Devlin v. New York*, 63 N. Y. 8.

⁴ *Citing*, *Robson v. Drummond*, 2 B. & Ad. 303; *British Waggon Co. v. Lea*, 5 Q. B. D. 149; *Parsons v. Woodward*, 2 Zabriskie, 196.

NOTE.—INSTANCES OF CONTRACTUAL RIGHTS HELD NON-ASSIGNABLE.

In *Delaware County v. Diebold Safe Co.* (1890), 133 U. S. 473, 488, MR. JUSTICE GRAY, delivering the opinion, remarked: "A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable. But when rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his rights and his obligations, can not be assigned without the consent of the other party to the original contract. *Arkansas Co. v. Belden Co.*, 127 U. S. 379, 387, 388. And the fact that that party is or represents a municipal corporation may have a bearing upon the question whether the contract is assignable, in whole or in part, without its assent."

The facts in *Boston Ice Company v. Potter* (1877), 123 Mass. 28, referred to in the text, were as follows: A., who had bought ice of B., ceased to take it, because of dissatisfaction with B.,

and contracted for ice with C. Subsequently B. bought C.'s business, and delivered ice to A., without notifying him of his purchase until after the delivery and consumption of the ice. *Held*, that B. could not sue A. for the price of the ice.

But if a defendant has received goods knowing they are sent by the assignee and does not return them, the assignee may sue. *Cincinnati Gas Co. v. Siemens Co.* (1894), 152 U. S. 200, 202.

See further, *Rapplee v. Racine Seeder Co.* (1890), 79 Iowa, 220: The defendant company contracted with G. to sell him a certain number of machines, for which payment was to be made by G.'s promissory notes as the machines were delivered; G. was to have the exclusive sale of the machines in certain territory, was to canvass the territory for the sale of the machines, and was to turn over to the defendant the cash and notes so taken—the cash to be endorsed as payment on G.'s notes, and the notes to be held as collateral security. After some of the machines had been sold by G. and delivered to purchasers under the contract, G. became insolvent, and assigned for the benefit of his creditors. The defendant notified the assignee that it would regard the contract as ended and would furnish no more machines thereunder; the defendant then entered the same territory and sold the machines there. The assignee sued in Iowa for a breach of this contract. *Held*, that sections 2082-2087 of the Iowa code, making all contracts assignable, did not authorize a suit by the assignee on the facts stated.

And see, *Worden v. Chicago R. R.* (1891), 82 Iowa, 735; *Schoonover v. Osborne*, (1899), — Iowa, —, 79 N. W. 263.

Accord also, *Chapin v. Longworth* (1877), 31 O. S. 421 (executory contract for personal services); *Redheffer v. Leathe* (1884), 15 Mo. App. 12; *Hilton v. Crooker* (1890), 30 Neb. 707, 716; *Hardy Implement Co. v. South Bend Iron Works* (1895), 129 Mo. 222, 228; *Bancroft v. Scribner* (1896), 21 C. C. A. 352; *Sprinkle v. Trulove*, (1899), 22 Ind. App. 577, 590. Other citations will be found in Wald's *Pollock on Contracts* (2nd ed.) 425.

So, under statutory relations, the mere right of a laborer or material man to assert and create a lien under a mechanic's lien law may be a personal right and not assignable. *Mills v. La Verne Land Co.* (1893), 97 Cal. 254. But a perfected lien may be assigned, or pass with an assignment of the demand for which it stands as security. *Rauer v. Fay* (1895), 110 Cal. 361, 367.

Likewise, a right arising *ex contractu* may be non-assignable for reasons of public policy, as when a public officer assigns his unearned salary or fees. *Bliss v. Lawrence* (1874), 58 N. Y. 442; *Bowery National Bank v. Wilson* (1890), 122 N. Y. 478; *in re, Matter of Worthington* (1894), 141 N. Y. 9; *Field v. Chipley* (1881), 79 Ky. 260; *Bangs v. Dunn* (1884), 66 Cal. 72.—*Ed.*

Compare, *Boatman v. Lasley* (1873), 23 O. S. 614: A right of way in gross is a right personal to the grantee and can not be made assignable by any words in the deed by which it was granted. *Say v. Stoddard* (1895), 27 O. S. 478: A tenant at will "has no certain indefeasible estate, nothing that can be assigned by him to any other, because the lessor may determine his will, and put him out whenever he pleases." *Moore v. Mayor of New York* (1853), 110; *Witthaus v. Schack*, (1887), 105 N. Y. 332, 336: "The settled theory of the law as to the nature of an inchoate right of dower is that it is not an estate or interest in land at all, but is a contingent claim arising not out of contract but as an institution of law, constituting a mere chose in action, incapable of transfer by grant or conveyance but susceptible only, during its inchoate state, of extinguishment."—*Per RUGER, C. J.*

LA RUE *v.* GROEZINGER.

SUPREME COURT OF CALIFORNIA, JUNE 6, 1890.

[84 Cal. 281.]

Appeal from a judgment of the Superior Court of Napa County, and from an order refusing a new trial.

The facts are stated in the opinion.

F. E. Johnston, and *E. W. McKinstry*, for appellant.

A. P. Catlin, and *Dennis Spencer*, for respondent.¹

HAYNE, C.—This was an action for damages for the breach of a contract to buy grapes. The substance of the material portions of the contract was as follows:

One Hopper agreed to sell all the grapes which he might raise during a period of ten years from the vines which were then growing, or which he might thereafter plant, in a certain vineyard. The grapes were to be "sound", and were to be gathered when they contained twenty-two per cent. of saccharine matter, and to be delivered in boxes at the wine-cellar of the defendant; the "first crop" to be delivered separately from the "second crop" of the same year. In consideration whereof the defendant agreed to accept the grapes and pay for them (after delivery) at the rate of twenty-five dollars per ton, in specified installments,—any advancement which might be made to draw interest at a given rate.

The parties performed this contract for five years. At the end of that time, viz., in October, 1885, Hopper conveyed the vineyard and assigned the contract to the plaintiff. At the time of the transfer the "first crop" of that year was being delivered by third parties, who had made advances upon it. The plaintiff does not appear to have had anything to do with this crop. He gathered the "second crop" of the same year, however, and delivered it to the defendant, who accepted and paid for it. This crop, it will be observed, was grown during the ownership of Hopper, and consequently may be supposed to have received the benefit of whatever care and skill he may have been able to give it. The crop of the following year was grown, gathered, and tendered by the plaintiff. The defendant refused to accept it, saying that he had no contract with the plaintiff, and was not buying grapes. The plaintiff thereupon sold the crop to the best advantage he could, and brought this action to recover the difference in price and the expenses of resale. The jury rendered a verdict in his favor for \$2,473.20, and judgment was entered accordingly. Afterward the court required him to remit \$119.20 as a condition of denying the defendant's motion for new trial. Such remission was made, and the defendant appeals from the judgment and the order denying a new trial.

¹ The arguments are omitted.

1. It is contended that the contract was not assignable.

The rule of the early common law as to the assignability of choses in action has been much changed in modern times. The Civil Code of this state provides that written contracts "for the payment of money or personal property" may be transferred *by endorsement* in the same manner as negotiable instruments (Sec. 1459), and there are other provisions, which are more sweeping, viz.:

"Sec. 1044. Property of *any kind* may be transferred, except as otherwise provided by this article."

"Sec. 1458. A right arising out of an obligation *is the property* of the person to whom it is due, and may be transferred as such."

These sections seem to do away with whatever restrictions there may formerly have been upon the power of the parties to assign their ordinary contracts. It is clear, however, that the provision can not be construed to render assignable all contracts whatever, regardless of their nature or effect, but must be taken with some qualification.

In the first place, it was not intended to render null any agreement that the parties may have made on the subject. Hence, if the contract itself provides in terms that it is not transferable, it certainly can not be transferred, although otherwise it might be so. Leases, and the tickets usually issued by railroad companies, are familiar instances of this. Upon the same principle, although a contract may not expressly say that it is not transferable, yet if there are equivalent expressions or language which excludes the idea of performance by another, it is not assignable. Of this character is the case of *Shultz v. Johnson*, 5 B. Mon. 497, which is much relied upon for the appellant. There the defendant agreed to buy from one Johnson successive crops of hemp, "of his own raising"; and it was held that the defendant could not be compelled to accept hemp raised by Johnson's administrator. The court said that "the question . . . in every case must turn at last upon the intention of the parties," and that the phrase "of his own raising" meant that the hemp was to be raised by him or under his personal superintendence and direction.

Upon the same principle it would probably be held that if the contract provided that it would not be assigned *to a particular person*, it could not be assigned to such person. And it would seem, from one of the cases cited by the appellant, that if an intention not to deal with a particular person appears from circumstances outside of the contract, it can not be assigned to such person. In the case referred to, the plaintiff had previously been supplying the defendant with ice; but the latter had become dissatisfied and had transferred his custom to a company called the Citizen's Ice Company, and had made a contract with it. After this the plaintiff bought out the Citizen's Ice Company, and without letting the defendant know of the transfer, went on supplying him with ice. When the defendant found out what had been done, he refused to pay for the ice, and the court held that he was not liable,

although he had consumed the ice, and had no fault to find with it. *Boston Ice Co. v. Potter*, 123 Mass. 30. We think that this case may be distinguished from the one before us, on the ground of the extraneous circumstances showing the defendant's intention not to deal with the plaintiff. If it can not be so distinguished we should be inclined to question the soundness of the decision.

In the next place, although the language may not show an intention that the contract should not be assigned, yet the nature of the case may be such that performance by another would be *an essentially different thing* from that contracted for. Thus a picture by one artist is an essentially different thing from a picture on the same subject by another artist; and so of a book composed by an author, or any other act or thing where the skill, credit, or other personal quality or circumstance of the party is a distinctive characteristic of the thing contracted for, or a material inducement to the contract. Under this general head come several cases relied upon for the appellant. Thus in *Lansden v. McCarthy*, 45 Mo. 106, it was held that a contract to deliver meat to a hotel, *to be paid for at the end of each month*, could not be assigned by the hotel keeper; the court saying: "The defendant's estimate of the solvency and pecuniary credit and standing of the plaintiff's assignor may have constituted an important inducement to the contract without which he never would have entered it." So in *Arkansas Smelting Company v. Belden Co.*, 127 U. S. 388, it was held that a contract to sell ore to a smelting company, the price of which was to be adjusted and paid by the mutual acts of the parties after delivery, was not assignable by the smelting company; the court, per Gray, J., saying: "During the time that must elapse between the delivery of the ore and the ascertainment and payment of the price, the defendant had no security for its payment, except in the character and solvency" of the smelting company.

If, therefore, the case before us comes within either of the qualifications above stated, then it must be conceded that the contract was not assignable. But, if it does not,—that is to say, if the language does not exclude the idea of performance by another, and the nature of the thing contracted for, or the circumstances of the case, do not show that the skill, credit, or other personal quality or circumstance of the party was a distinctive characteristic of the thing stipulated for, or a material inducement to the contract,—then the contract was assignable, under the provisions above quoted. It is obvious, therefore, that, in this state at least, the question whether a contract is assignable is a question of construction. As was said in the Kentucky case above referred to, "the question . . . in every case must turn at last upon the intention of the parties." But upon a proper construction, there is nothing to show that the contract was not assignable.

(a) There is nothing in the language which excludes the idea of performance by another.

The mere fact that the name of the owner of the vineyard was used does not exclude the idea of such performance. The name of the contracting party is almost always inserted as a convenient means of identification. Thus where John Smith signs a contract which stated that John Smith agrees to pay John Doe a sum of money in consideration of a conveyance of land which the latter agrees to make to the former upon such payment, there can be no doubt that the use of Smith's name does not indicate an intention that his assignee could not perform the contract. To say otherwise would be to say that hardly any contract is assignable unless the word "assigns," or equivalent language, is inserted, which would hardly be contended.

Nor is the use of personal pronouns of more significance. The counsel for the appellant lay stress upon the circumstance that Hopper agreed to deliver "all the grapes *he* may raise on the vines *he* now has growing on *his* place," etc. But it seems clear that these pronouns were used as equivalents of the proper name, and merely to save repetition of such name. They do not import a desire for the personal services or attention of the owner as contradistinguished from his assignee. This will be readily seen if the same words are applied to different subject matter. Thus if it be agreed to buy from another at a fixed price a specific quantity of fire-wood, which *he* agrees to cut during a certain period from the timber *he* then has growing upon *his* farm, etc., it would surely not be argued that the mere language indicated that the wood was to be cut by the owner himself, or by his agents, and not by his assignee. And so of similar language in contracts to pay money, to convey land, and the like.

(b) There is nothing in the nature or the circumstances of the case which shows that the skill or other personal quality of the party was a distinctive characteristic of the thing stipulated for, or a material inducement to the contract.

There is no evidence that grapes for wine-making, containing a specified amount of saccharine matter, raised upon a particular vineyard by one man, would necessarily or probably be different from grapes raised from the same vines by another man. Possibly there would be a difference between grapes from different vineyards, as the difference between the climate and soil of different places in close proximity is known to be considerable. But here not only is the vineyard the same, but the vines were the same,—that is to say, the crop in question was from vines planted by the assignor.

It is not impossible that one man might have some peculiar skill of secret by which he could raise better grapes from the same vines than other men could. But there is no evidence that there was any such peculiarity about the original owner of this vineyard, and we do not think that the court will *assume* that there was. And while it is to be conceded that men have perfect liberty to contract with whom they choose, and to exclude the idea of performance by another, yet in the

absence of anything indicating such an intention, we do not think that the court should indulge in speculation as to possible prejudice or fancied preference. It should not assume that the parties were influenced by unusual or conjectural motives merely because some men might be so affected under similar circumstances. For example, some men of solvency and credit have preferences as to the persons from whom they borrow money, and would be displeased at having their paper passed around among usurers. Yet at the present day all the courts would hold that, in the absence of indication of a contrary intention, contracts for the payment of money are assignable. So in many cases owners of real property have some choice as to the persons they admit as tenants. Yet it is well settled that an ordinary lease is assignable by the tenant, in the absence of the manifestation of a contrary intention. And the case of a lease is not to be disposed of by saying that it is an interest in property. For by the express provision of the code, the right to the performance of an obligation is property. (Civ. Code, sec. 1458.)

These instances, and others which might be mentioned, show that it will not do to indulge in conjecture as to fanciful and unusual motives and prejudices. Now, in the case before us, as has been stated, there is no evidence of anything from which it can be inferred that performance was to be by the original owner of the vineyard, and not by another. Suppose that he had gone to live permanently in Europe, and had given no kind of attention or supervision to the place, would it have been contended that under such circumstances the defendant would have been justified in refusing to accept grapes of the required standard grown upon the vineyard by an agent? We imagine not. And in the case put, there would be no kind of supervision by the owner, who would be entirely and permanently absent. And it seems purely fanciful to say that in such case he would exercise some skill in the selection of an agent, and that the parties must be supposed to have had this in view. Now, if in the case put, the defendant would be liable, how can it be said that the circumstances show that the *personal* qualities of the owner were a material inducement to the contract? We can not see any reason that would make this contract non-assignable which would not equally apply to the ordinary crops of corn, wheat, oats, potatoes, etc. If in such cases a party prefers to deal with one person to the exclusion of assignees, it is very easy to indicate such preference in the contract. Courts will not assume that unusual motives exist.

The learned counsel for the appellant have advanced other considerations, which may be noticed briefly.

The fact that the contract provided in substance that *if* advances should be made by the wine-maker they should bear interest at a certain rate does not indicate that the solvency or credit of the owner of

the vineyard was an inducement to the contract ; for the making of such advances was entirely optional with the wine-maker.

Nor is there anything in the circumstance that the owner of the vineyard was not *bound* to raise grapes. What the contract secured to him was *the right* to raise grapes of a specified standard, and to compel the defendant to take them at a fixed price. This may have been an unwise contract for the defendant to make. But an optional contract upon sufficient consideration is binding. *Hall v. Center*, 40 Cal. 63. And the mere fact that it is optional can not be a reason why it should not be assigned.

We have not overlooked the distinction pointed out by counsel between executory contracts and contracts which have been executed on one side. What we have said applies where something remains to be done by the party who assigns.

And, as a matter of course (since a party can not release himself from an obligation by his own act without the consent of the other party), it is only the benefit of a contract which can be assigned. Where there is a burden, it can not be transferred without the consent of the other party. Civ. Code, sec. 1457.

It may be added that we have examined the English case of *Robson v. Drummond*,¹ cited by counsel, but consider it to have been disapproved in the subsequent case of the *British Waggon Co. v. Lea* [1880], L. R. 5 Q. B. Div. 149.² It is true that *the principle* of the former case was approved in the latter. But it is only the application of the principle which makes the case in point here, and this is what was disapproved in the latter case, which did not turn upon the use of the word "executors," in the contract.³

VANCLIEF, C., and BELCHER, C. C., concurred.

Hearing in Bank denied.⁴

¹ (1831) 2 B. & Ad. 303.

² Found also in Williston's *Cases on Contracts*, p. 449.

³ Part of the opinion, on another point, is omitted. The judgment was modified by deducting the sum of \$217.87, and as thus modified was affirmed.

⁴ In *Devlin v. The Mayor* (1875), 63 N. Y. 8, the plaintiff sued as assignee of a contract entered into between the City of New York and one Hackley, under an act for cleaning the streets of the city. By the contract, the contractor agreed to sweep all the paved streets, avenues, lanes, alleys, etc., in said city at least once a week, Broadway once every twenty-four hours, and certain other streets twice a week, for the term of five years, and immediately to remove the sweepings. The defendant corporation contended that the contract was not assignable. Said the court, per ALLEN, J. (p. 15): "An assignment by the contractor of the amounts which would have become due from the city from time to time made before the doing of the work or the performance of the conditions upon which the payments depended, would, under the liberal rule permitting the assignment of choses in action now prevailing, be valid. Expectancies, as well as existing rights of action, may be assigned, and the rights of the assignees will be protected and enforced at law. *Field v. Mayor, etc.*, 2 Seld. 179; *Hall v. Buffalo*, 2 Abb. Ct. of App. Dec. 301. An assignment may include all contingent and incidental benefits or results of an executory contract, as well as the direct fruits or earnings under it, and thus entitle the assignee to the damages resulting from a violation of its terms. The right of action for a breach of the contract, resulting in pecuniary loss to the contractor, would survive to the personal representatives of the aggrieved party, and that is one test of the assignability of contracts and choses in action. *Byrnie v. Wood*, 24 N. Y. 607; *McKee v.*

Judd, 2 Kern. 622; *Zabriskie v. Smith*, 3 id. 322. In principle it would not impair the rights of the assignee, or destroy the assignable quality of the contract or claim, that the assignee, as between himself and the assignor, has assumed some duty in performing the conditions precedent to a perfected cause of action, or is made the agent or substitute of the assignor in the performance of the contract. If the service to be rendered or the condition to be performed is not necessarily personal, and such as can only with due regard to the intent of the parties, and the rights of the adverse party, be rendered or performed by the original contracting party, and the latter has not disqualified himself from the performance of the contract, the mere fact that the individual representing and acting for him is the assignee, and not the mere agent or servant, will not operate as a rescission of, or constitute a cause for terminating the contract. Whether the agent for performing the contract acts under a naked power, or a power coupled with an interest, can not affect the character or vary the effect of the delegation of power by the original contractor. Hackley, the original contractor, was at no time discharged from his obligations to the city, nor was he disqualified for the performance of the contract; but was at all times in a position to perform his part of this agreement, facts which distinguish this case from *Stevens v. Benning*, 6 De G., M. & G., 223, and *Robson v. Drummond*, 2 Barn. & Ad. 303."

See also *New England Iron Co. v. Gilbert Elevated R. R.* (1883), 91 N. Y. 153, 167; *Rochester Lantern Co. v. Stiles & Parker Press Co.* (1892), 135 N. Y. 209, 216; *York v. Conde*, (1895), 147 N. Y. 486; *Day v. Vinson*, (—) 78 Wis. 198; *Mitchell v. Taylor* (1895), 27 Ore. 377.—Ed.

2. *Among rights in tort.*

PURPLE v. HUDSON RIVER RAILROAD COMPANY.

SUPERIOR COURT OF THE CITY OF NEW YORK, GENERAL TERM,
OCTOBER 10, 1854.

[4 *Duer*. 74.]

Appeal from a judgment for the defendants upon a demurrer to the complaint.

The complaint was in these words:—

The plaintiff complains of the defendants, and shows to the court that the defendants are a body corporate, duly incorporated under the laws of the State of New York, and keeping an office for the transaction of business within the city of New York, and were engaged in the transportation of passengers in cars, upon a railroad running from the village of Greenbush to Chambers street, in the city of New York. And at the times hereinafter mentioned, owned said railroad and the cars running thereon, and had owned and employed steam engines to draw said cars to 31st street in said city, and horses to draw said cars from 31st street to Chambers street aforesaid, and had and employed agents and servants to manage and conduct the said cars and the drawing the same as aforesaid.

And this plaintiff further avers, that Minerva Purple did, on the 17th day of August, 1853, take passage in a train of cars so run by said defendants, to be carried from Greenbush to Canal street, in the city of New York, which is one of the usual intermediate stopping places of said train, and paid to said defendants the fare charged by them for such transportation; and the said defendants, in consideration thereof, then undertook to carry the said Minerva Purple to Canal street aforesaid, in their said cars, and there to land her. And the plaintiff further avers, that the said defendant did not land the said Minerva Purple at Canal street aforesaid, in compliance with their said contract and agreement, in a proper and reasonable manner, or otherwise than is hereinafter set forth.

And this plaintiff further avers, that in the course of such transportation, the said Minerva Purple being in the proper place, and in the car in which she was directed to be by the agents of said defendants, and while landing at Canal

1 "Blackstone seems to have entertained the opinion that the term *chose*, or thing, in action only included debts due, or damages recoverable for the breach of a contract, express or implied (2 Com. 388, 396-7). But this definition is too limited. The term *chose in action* is used in contradistinction to *chose in possession*. It includes all rights to personal property not in possession which may be enforced by action; and it makes no difference whether the owner has been deprived of his property by the tortious act of another, or by his breach of a contract, expressed or implied. In both cases, the debt or damages of the owner is a '*thing in action*.'"—*Per* BRONSON, CH. J., in *Gillet v. Fairchild* (1847), 4 Denio, 80, 82, citing 2 *Kent*, 351; 1 *Chit. G. P.* 99, note p; *Tomlin's L. D.*, "Chose"; *The King v. Copper*, 5 Price, 217; 1 *Lilly, Ab.* 378.

See also, 10 *Law Quarterly Rev.* 143 (1894), where Mr. Cyprian Williams, examining the history of the term in English law, reaches the conclusion "that there is good reason and respectable authority, besides that of *Termes de la Ley* and *Blount's Law Dictionary*, for not limiting the term *chose in action*, even at the present day, so as to exclude a right of action in tort"—for torts to the person or representative as well as for torts affecting property. *Contra*, Sir Howard Elphinstone, in 9 *Law Quarterly Rev.* 311 (1893).—*Ed.*

street in a proper manner, and in pursuance of the directions of said defendants' agents and servants, was violently thrown from said car into the street, upon the pavement; that said car started suddenly ahead while said Minerva Purple was landing therefrom, and before a proper and reasonable time had been allowed her to land, by which start she was thrown as above mentioned. And he further avers, that her being thrown as above mentioned, was caused wholly by the negligent, careless, and unskilful conduct of the servants and agents of said defendants, and without any fault or negligence on the part of said Minerva Purple.

And the plaintiff further avers, that the said Minerva Purple was seriously injured by being thrown as aforesaid; that her thigh-bone, at or near the neck, was thereby broken and will never unite, so as to render the same serviceable; that she suffered great pain in consequence thereof, and was confined to her bed nine weeks, and is still unable to walk or use her left leg, and has been obliged to procure medical attendance and nursing, and to expend large sums of money, and that she was thereby, in other respects, severely bruised and injured in her body, and greatly alarmed in mind.

And the plaintiff further avers, that the said Minerva Purple has heretofore by assignments, duly executed, under her seal, and for good and valuable consideration, assigned to the said plaintiff all her claim, demand, and cause of action against the defendants, by reason of the premises, and that he is now the lawful holder and owner thereof. Wherefore, &c.

To this complaint the defendants demurred, upon the following grounds:

1. That it appears from said complaint that there is a defect of parties to the action, in that Minerva Purple ought to be the plaintiff therein, in the stead of the said Samuel S. Purple, the latter not appearing from the complaint to have any valid cause of action against these defendants.

2. That the complaint does not state facts sufficient to constitute a cause of action in the plaintiff against the defendants, in that the alleged claim, demand, and cause of action of the said Minerva Purple, are not the legal subject of an assignment by her to the plaintiff.¹

G. I. Betts, for the plaintiff.

W. Fullerton, *contra*.

By the Court. DUER, J.—It is evident upon reading this complaint, that the injuries to the person of M. Purple, as caused by the negligence of the servants of the defendants, are the *gravamen*, for which the damages claimed are sought to be recovered.

The contract with the company is stated merely by way of inducement, as giving a more aggravated character to the negligence charged.

That a right of action for injuries to the person does not survive to an executor, is quite certain, and we agree with Mr. Justice Paige, *Hoyt v. Thompson*, [1851] 1 Selden, 347, that we find here the proper test of the assignability of a chose in action. It may be assigned if it would survive, and not otherwise

¹ The opinion of MR. JUSTICE HOFFMAN, at Special Term, allowing the demurrer, is omitted.

It seems to be the opinion, from the cases brought before us, of many members of the profession, that the Code has abolished the distinctions that formerly prevailed, and that every right of action, no matter from what cause it may arise, is now assignable, so as to enable the assignee to maintain the action in his own name, in all cases whatever; but this is certainly an error, and is the very error which the addition made to § 111 of the Code, in the amendments of 1851, was designed to correct. The only alteration made by the Code, is to enable the assignee to maintain the action in his own name, in those cases, and in those only, in which, by the law, as it existed when the Code was adopted, the right of action was assignable in law or in equity. The common law offences of champerty and maintenance are not wholly obsolete.

On the other hand, as the Code has not enlarged, neither has it restricted, the power of assignment; for we wholly dissent from the construction that some judges seem disposed to give to § 111 as amended in 1851, namely, that it is limited to demands arising out of contract, and forbids by implication the assignment of any founded on a tort.¹

We hold, that every demand that is connected with a right in property, real or personal, and which claims redress for a violation of the right, is assignable, whether the violation is, technically speaking, a tort, or simply a breach of contract. And we think that this rule is a legitimate, if not a necessary deduction from the opinion of the Supreme Court as delivered by Cowen, J., in the case of the *People v. Tioga Common Pleas*, 19 Wend. 73. The rule thus stated excludes only those torts that are so strictly personal that they die with the person, and it corresponds exactly with the views of Mr. Justice Paige in *Hoyt v. Thompson*.

The demurrer in the case before us, as the cause of action stated in the complaint is for a tort strictly personal, is well taken, and the judgment appealed from is therefore affirmed with costs.²

¹ Compare, *Snyder v. Wabash Ry.* (1885), 86 Mo. 613, 619, with *Kansas Midland Ry. v. Brehm* (1895), 54 Kan. 751, 756.—Ed.

² Accord, (no statute affecting the assignability of the chose): *Hodgman v. The Western R. R.* (1852), 7 How. Pr. 492. *Stone v. Boston R. R.* (1856), 7 Gray, 539. *Brooks v. Hanford*, (1859), 15 Abb. Pr. 342: "The rendering of the verdict did not alter the nature of the claim. It liquidated the amount of the damages which the plaintiff was to recover, but the claim remained the same. The verdict was but a stage in the progress of the cause, and there was no debt or claim which would pass by assignment until the judgment was perfected."—Per BROWN, J.

So also, *Lawrence v. Martin* (1863), 22 Cal. 174; *Hunt v. Conrad* (1891), 47 Minn. 557 (distinguished in *Kent v. Chapel* (1897), 67 Minn. 420, 422, on the ground that a Minnesota statute changing the common law rule as to assignability had been overlooked).

See also, *Pulver v. Harris* (1873), 52 N. Y. 73 (a judgment in an action for assault and battery was assigned, but afterwards reversed upon appeal, and a new trial granted. Before the new trial, the plaintiff released the defendant; but the assignee of the judgment (attorney for the plaintiff in the original suit) undertook to go on with the action. Held, that the original cause of action was not assignable; and that while the judgment was assignable, its reversal left the assignment "entirely inoperative so far as the defendant's rights were concerned."—Ed.

BUTLER *v.* THE NEW YORK AND ERIE RAILROAD COMPANY.

SUPREME COURT OF NEW YORK, GENERAL TERM, JULY, 1856.

[22 Barb. 110.]

This action was commenced in a justice's court, and the plaintiff's complaint was as follows :

"The plaintiff complains of the defendants for that on or about the 21st March, 1853, at Union, in said county, defendants by their cars and engines carelessly and negligently ran over and killed one yoke of oxen the property of one David C. Warner, of the value of \$100, which claim has been assigned and belongs to the plaintiff, and for which he claims judgment to \$100."

The defendants denied the complaint.

James H. Christopher testified upon the trial that he purchased this claim of Warner and sold the same to the plaintiff. David C. Warner testified that he owned the oxen at the time of the collision, and sold them to Christopher after they were killed. The plaintiff gave evidence showing that the oxen were killed by one of the defendants' engines running over them, and tending to show that they were killed by the negligence of the defendants' servants; and the justice rendered judgment for the plaintiff for \$100 damages and \$5 costs. . . .

The defendants appealed to the Broome county court, where the judgment was affirmed. The defendants then appealed to this court. There was no demand made of the defendants by the plaintiff for these oxen, or otherwise.

LaGrange & Talbert, for the plaintiff.

Jacob Morris, for the defendants.

By the Court, MASON, J.—The first question which I propose to consider in this case is, whether the plaintiff, as assignee of this cause of action, was entitled to recover those damages in this action. At common law a right of action for injuries to the person or character was not assignable.¹ These are mere personal torts and die with the party, and are not assignable. Such are actions of slander, libel, assault and battery, false imprisonment, crim. con., seduction, &c. On the other hand, where the injury affects the estate rather than the person, where the action is brought for damage to the estate and not for injury to the person, personal feelings, or character, the right of action could be bought and sold at common law. Such a right of action, upon the death, bankruptcy, or insolvency of the party injured, passes to the executor or assignee as part of his assets, because it affects his estate

¹ *Citing, The People v. Tioga Common Pleas* (1837), 19 Wend. 73; *Hodgman v. Western Railroad* (1852), 7 How. Pr. 492.

and not his personal rights.¹ Mere matters in action, however, were not so far transferable at common law as to pass the legal title, unless we except certain commercial instruments. The equitable title only passed, but when assigned with notice to the person from whom the liability is due, courts of law would protect the assignee against all prejudice from the acts of the assignor. *The People v. Tioga Common Pleas*, 19 Wend. 73, 75. The action, however, had to be enforced in the name of the original party.

The 111th section of the code adopts the equity and not the legal rule in regard to parties. It requires that every action must be prosecuted in the name of the real party in interest; but by an amendment of this section, in 1851, it is declared "that this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract." Before this section was amended in 1851, by adding the above restriction, it was held that in the class of cases where the right of action for a tort affected the property of the party, the right of action was assignable, so as to enable the assignee, under section 111 of the code, to sue in his own name.² This amendment to section 111 has been supposed by some as intended to restrict this right, and to establish the general principle that nothing but a cause of action growing out of contract could be assigned, so as to give the assignee such an interest as would enable him to enforce his demand by civil action.

I do not see how any such construction can be given to this amendment. It is true, it does not authorize the assignment of a thing in action not arising out of contract. Nor does it forbid such assignment. The right rests upon precisely the same footing it did before, and an assignee takes precisely the same interest in the assignment of every species of demand, either at law or in equity, as he did before the code. It follows, therefore, that if the demand was such as was capable of assignment before the code, so as to carry an equitable interest to the assignee, it is such a demand as will now pass by assignment, so as to give the assignee a right of action therein.³

¹ Citing, *The People v. Tioga Common Pleas* (1837), 19 Wend. 73; 1 Chitty's Pl. 68; *Chamberlain v. Williamson* (1814), 2 Maule & Sel. 408; *North v. Turner* (1823), 9 Serg. & Rawle, 244; *Robinson v. Weeks* (1851), 6 How. Pr. 161; *Comegys v. Vasse* (1828), 1 Peters', 193, 213; *Hodgman v. Western R. R.* (1852), 7 How. Pr. 492; *Hoyt v. Thompson* (1851), 1 Seld. 347.

² Citing, *Robinson v. Weeks*, 6 H.w. Pr. R. 61; *Hodgman v. Western R. R.*, 7 id. 492; *Hall v. Robinson*, 2 Comst. 293; *Hoyt v. Thompson*, 1 Seld. 347.

³ Accord (as to the effect of the provision that "this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract"): *McArthur v. Green Bay Canal Co.* (1874), 34 Wis. 139, 153; *Snyder v. Wabash Ry.* (1885), 86 Mo. 613, 619; "In view of what has been said, we must hold that the proviso added by way of amendment in 1855 to section 346a [as quoted above] neither forbade the assignment of causes of action arising in tort, for such injuries to property as survived to the personal representative, nor authorized the assignment of such causes of action arising in tort as did not survive to such representative but died with the person, and that in so far as the opinion in *Wellen v. The St. Louis, Iron Mountain & Southern Ry.*, 74 Mo. 521, conflicts with what is here said, it is overruled." —Per NORTON, J. Dissent by HENRY, C. J.

Contra: *Kansas Midland Ry. v. Brehm*, (1895), 54 Kan. 751, 756: "Evidently this provision [as quoted above] recognizes the limitation which existed at common law when the code was

If I am right in the views above expressed, it follows that mere personal torts, which die with the person, such as slander, assault and battery, false imprisonment, crim. con., seduction, and the like, are not assignable; but torts for taking and converting personal property, or for injury to personal property; and it seems generally all such rights of action for a tort as would survive to the personal representatives of the party, may be assigned so as to pass an interest to the assignee, which he can assert in his own name in a civil action under the code as he formerly might do in the name of the assignor at law.¹

adopted, and inferentially at least, provides that a chose in action arising out of a pure tort is not assignable."—*Per* JOHNSTON, J. The action was to recover damages caused by the negligent escape of fire from a locomotive. So also, *Atchison R. R. v. Kansas Insurance Co.* (1898), 7 Kan. App. 447.—*Ed.*

¹ *Citing*, contra, *Therman v. Wells*, (1854), 18 Barb. 500.

The judgment of the justice below was however reversed because of the plaintiff's failure to give a proper notice of the intended examination of Christopher.

NOTE.—THE ASSIGNABILITY OF A TORT TO PROPERTY.

In *McKee v. Judd*, (1855), 12 N. Y. 622, GARDINER, CH. J., delivering the majority opinion, remarked: "In *The People v. Tioga Common Pleas* [1837], 19 Wend. 73, this subject was discussed by Judge Cowen with his usual learning and ability; he observes, in speaking of choses in action: 'That for the purposes of any sort of assignment, legal or equitable, I can nowhere find that the term has ever been carried beyond a claim due either on contract or such whereby some special damage has arisen to the estate of the assignor.' And his conclusion is that *demands arising from injuries, strictly personal, whether arising upon tort or contract, are not assignable, but that all others are.* Upon the authority and reasoning of that case, and the decisions there referred to, the law may be considered as settled that a claim to damages arising from the *wrongful conversion* of personal property is a chose in action that is assignable."

Accord also, *Merrill v. Grinnell* (1864), 30 N. Y. 594, 614 (claim to recover the value of a trunk and its contents negligently lost by a common carrier). *Fulton Fire Ins. Co. v. Baldwin* (1868), 37 N. Y. 648 (claim against one who had contracted to keep a canal free from obstructions and had negligently permitted it to be obstructed). *Julian v. Hoosier Drill Co.* (1881), 78 Ind. 408 (claim for damages for infringing a trademark). *McArthur v. Green Bay Canal Co.* (1874), 34 Wis. 139, 152 (claim for damages for the destruction of a tug). *Gates v. Northern Pacific R. R.* (1885), 64 Wis. 64; *Lazard v. Wheeler* (1863), 22 Cal. 140 (claim for damages for conversion of property). *Dickson v. Merchants' Elevator Co.* (1891), 44 Mo. App. 498, 505. *More v. Massini* (1867), 32 Cal. 590 (claim for damages for trespass on land). *Webber v. Quaw* (1879), 46 Wis. 118; *Chouteau v. Boughton* (1890), 100 Mo. 406, 410, in text, *ante*, p. 256. *Snyder v. Wabash Ry.* (1885), 86 Mo. 613 (claim in damages for loss of a hog killed upon the tracks of the defendant railway, through its failure to maintain fences.)

Norfolk & Western R. R. v. Read [1890], 87 Va. 185 [trespass on the case against a common carrier for injury to goods in transit.] Said the court, per LACV, J. (p. 189): "While a right of action for mere personal *torts*, such as assault and battery, false imprisonment, malicious prosecution, defamation and deceit, which die with the party and do not survive to the personal representative, can not be assigned (*Comegys v. Vasse*, 1 Pet. 213; *Burt v. Baldwin*, 30 Barb. 182; *Rice v. Stone*, 1 Allen, 566; *Devlin v. Mayor*, 63 N. Y. 275; *Meech v. Stoner*, 10 N. Y. 29; Va. Code of 1873, Ch. 145, §§ 8, 9, 10) a right of action to recover damages for an injury to property, real or personal, may, however, be assigned. *Gillett v. Fairchild*, 4 Denio, 80; *Hudson v. Plitt*, 11 Paige, 180; *McBride v. Farmers Bank*, 26 N. Y. 456; *North v. Turner*, 9 Serg. & R. 244; *Languid v. Wheeler*, 22 Cal. 142.

"And it may be said generally that every demand connected with a right of property, real or personal, may be assigned, and it seems that all rights of action which would survive to the personal representative may be assigned. *Butler v. N. Y. & E. R. Co.*, 22 Barb. 110; *Patton v. Wilson*, 34 Penn. 299; *Jordan v. Gillen*, 44 N. H. 424. . . . As to the question whether a mere right *ad litem* for unliquidated damages, founded on a *tort*, can be lawfully assigned

—'this question,' says NESMITH, J., in *Jordan v. Gillen* (1862), *supra*, 'has recently been decided in the affirmative in New York. There it has been held that merely personal actions, which die with the person, are not assignable; but torts for taking and converting personal property, or for injury to personal property, [are assignable]; and it seems generally that all such rights of action for a tort as would survive to the personal representatives, may be assigned, so as to pass an interest to an assignee, which he can now assert under the code in a civil action in his own name, as he might formerly at common law assert in the name of his assignor.' "

It is to be observed, however, that in a number of these cases, the assignability of the claim in tort is expressly put upon the ground that it would survive by statute.

"On the question whether the assignability of a tort must not always depend upon the existence of a statute, permitting it directly or indirectly, see *Oliver v. Walsh* (1856), 6 Cal. 456, and compare *Pollock on Torts*, ch. iii. 2, (on the survivability of the right of action for a tort), and *Dacey on Parties*, 429.

See also, *Clerk and Lindell on Torts*, p. 46: 'The question whether a right of action for a tort is assignable, so as to entitle the assignee to sue in his own name is one which apparently has never been decided [in England], though presumably where the question arises it will be held that it can not be assigned. No doubt by sec. 25 of the Judicature Act, 1873, 'any absolute assignment by writing . . . of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action,' shall be effectual to transfer the legal right to such debt or chose in action. But there are two objections in the way of holding that that section authorizes the legal transfer of a right of action in tort. In the first place, although a right of action in tort is a chose in action in the widest sense of that term, it may be doubted whether it is a chose in action within the meaning of the section. The words 'or other legal chose in action' seem to point to something *ejusdem generis* with debts, *i. e.*, causes of action arising out of contracts. And secondly, the Judicature Act is a mere statute of procedure; it was not intended to affect the rights of parties. The section can not be regarded as making that assignable in law which was not assignable in equity before, but only as enabling an assignee to sue in his own name in cases in which before the Act he could have sued in the name of his assignor. But there seems to be no reported case in this country in which it has ever been held that an assignee of a right of action in tort can sue in the name of his assignor. It is true that in the case of *Cohen v. Mitchell*, 25 Q. B. D. 262, where a cause of action for the conversion of goods was assigned, and the action was carried on in the name of the assignor, the judgment of the Court of Appeal involved the assumption that the assignment was good, but the point was not argued, and no decision was given upon it. In *Williams v. Protheroe*, 5 Bing. 309, the court are reported to have said that there is no objection to the validity of an agreement by the vendor of an estate that the purchaser should be entitled to sue in the vendor's name for 'injuries done to it previously to the purchase,' but on reference to the facts of the case, it appears that the action to which the agreement related was an action against a tenant for dilapidations arising from non-repair, which was a mere breach of contract, and actions upon contracts have always been assignable in equity. That case is no authority for saying that a cause of action for active injury would be assignable. In *De Hoghton v. Money*, L. R., 2 Ch. 164, Turner, L. J., said, that 'a right to complain of a fraud is not a marketable commodity,' and the same view had been expressed by Lord Abinger in *Prosser v. Edmonds*, 1 Y. & C. 481. But if a right of action for fraud is not assignable, then neither ought a right of action for any other tort to be so.

"There seems, indeed, to be no valid reason in principle for any distinction as regards their assignability between rights of action for torts to property, and rights of action for torts to the person or reputation. The reason given by Lord Abinger in *Howard v. Crowther*, 8 M. & W. 601, for holding that actions for torts of the latter class do not pass to trustees in bankruptcy, while those for torts of the former class do, namely, that in actions of the latter class the trustees would get no sufficient damages, has no application to the case of assignment of such rights of action by a solvent assignor. In the case of bankruptcy it would be unjust for the law to compulsorily deprive the injured person of a substantial claim for damages, unless by so doing it conferred a corresponding benefit upon the creditors; but in the case of a voluntary assignment by the injured person, the fact that the assignee will get but little damages, though it may present a formidable difficulty in the way of finding a purchaser, can afford no good reason why the injured person should not sell his cause of action for what it will fetch if he likes. And yet if a right of action for a purely personal tort were assignable, this strange result would follow, that the assignee would have only a cause of action determinable upon the death of another person by reason of the maxim *actio*

personalis moritur cum persona. But such a limitation has never been heard of. It is apprehended that actions for purely personal torts are not assignable, and that, if they are not, neither are the actions for torts to property, even though they purport to be assigned along with the injured property itself. If, as seems to be the prevailing view, the ground of the old rule that choses in action are not assignable is that the assignment is open to the objection of being champertous, that is an objection which applies as well to torts of the one kind as to torts of the other.

"Assuming, however, that rights of action in tort are in general not assignable, there are two exceptions to that rule: first, a chose in action may be assigned to the Crown; and, secondly, rights of action of any kind which pass to a trustee in bankruptcy (including rights of actions for torts to the debtor's property) are, it appears, assignable by the trustee to a stranger. But as the objection to the purchase of a cause of action on the score of champerty must be wholly independent of the character of the vendor, this case may be difficult to reconcile with other authorities."—*Ed.*

ZABRISKIE AND OTHERS v. SMITH.

COURT OF APPEALS OF NEW YORK, DECEMBER, 1855.

[13 N. Y. 322.]

Appeal from a judgment of the superior court of the city of New York. The action was commenced in November, 1852.

The plaintiffs, Zabriskie, Buckley, and Hunter, in their complaint, stated that in the year 1848 they and one Gray were co-partners, as dry goods jobbers, in the city of New York, under the firm name of John A. C. Gray & Co., and that as such co-partners, they in that year sold to one Walter H. Smith goods to the amount of \$3,350.20, at different times; that the defendant wrongfully and deceitfully encouraged and persuaded the firm to sell and deliver the goods to said W. H. Smith, on credit; that in order to induce them to do so, the defendant, in April, 1848, sent a message to the firm by one Sayre, to the effect that he, the defendant, had examined into the affairs of Walter H. Smith, and that he thought that what the firm should sell to said Walter would be all right, and if anything did happen, they would be taken care of; that he, the defendant, had talked with W. H. Smith, and was satisfied that he was solvent and that he was going on well; that the message was delivered by Sayre before the sale of any of the goods; and that the firm relying on its truth and honesty, in consequence thereof, were induced and wrongfully persuaded to sell and deliver the goods to W. H. Smith, on credit; whereas the plaintiffs allege that the message was false and deceitful, and that the defendant had not examined the affairs of Smith, and was not satisfied that he was going on well or was solvent; but Smith was then and has been ever since insolvent, and the defendant was unacquainted with his affairs, except to know that he was largely in debt; and the defendant himself then had a claim on him for \$2,500, and was, besides, his endorser for \$1,500 on a note held by a bank; and W. H. Smith had informed the defendant that he could go on in business if and on condition that the defendant would have the note renewed and continued at the bank; which fact, at the time the defendant sent the message aforesaid, he fraudulently and wrongfully suppressed and withheld from the said firm; therefore the plaintiffs say that the defendant falsely represented the credit of Smith.

They further allege that they would not have trusted Smith with the goods, except in consequence of the message; that the defendant knew that the message would induce the firm to sell Smith the goods on credit, when he was not a person safely to be trusted. They further allege that in January, 1849, Smith failed and made an assignment to a son of the defendant, in which he preferred the defendant for the above mentioned \$4,000, which was paid by the assignees out of the

property thus assigned, a portion of which was the goods which the firm had sold Smith; that the firm by means of said message and the wrong conduct of the defendant, have been deceived and defrauded to the amount of the goods sold, except as to \$500 which had been paid on account. They further set forth that Gray retired from the firm prior to the commencement of the suit, and had assigned to Zabriskie, a co-partner and one of the plaintiffs, all his right, share and interest in the goods so sold, and all claims and right of action against the defendant in respect to the premises.

The answer admitted sending a message to the firm by Sayre, somewhat different in its terms from the one set out in the complaint, and admitted some of the other facts stated and denied others, and denied all fraud. It admitted that Gray had retired from the firm before the commencement of the action, but denied that he had assigned to Zabriskie his interest in the goods sold Smith or the claim in suit. It insisted that Gray was, at the time of the commencement of the action, a part owner of the demand sued on, and should have been made a party, and prays that the complaint should be dismissed on account of his not being joined.

The cause was tried in New York, in June, 1853, before Mr. Justice Bosworth. Verdict for the plaintiff for \$3,413.86. On an appeal to the general term, the judgment entered on the verdict was affirmed, whereupon the defendant brought this appeal.¹

William Porter, for the appellant.

E. L. Fancher, for the respondents.

DENIO, J.—The questions of law arising upon this appeal appear to be the following: 1. Whether the complaint sets forth a cause of action; 2. Whether the evidence on the part of the plaintiffs, standing uncontradicted, made out a case suitable to be submitted to the jury, or whether, on the contrary, they ought to have been nonsuited; 3. Whether the sales of goods made by the plaintiffs to Walter H. Smith, subsequent to April, 1848, were so far out of the influence of the alleged false representation that the consideration of them should have been taken from the jury; 4. Whether the interest of John A. C. Gray was assignable; if not, 5. Whether the action in the names of the other parties can be sustained, in consequence of the defendant having omitted to demur to the complaint; and, 6. If the last point is determined against the defendant, whether the value of the interest of Gray ought to have been deducted from the recovery. . . .²

(4.) If the interest of Mr. Gray in the cause of action was not of a nature to be transferable by assignment, the written transfer given in evidence was inoperative, and he was a necessary party to the action. We decided at the last term, in the case of *McKee v. Judd*, 12 N. Y.,

¹ The reporter's statement has been abridged.

² Only so much of the opinion is given as relates to the fourth and fifth questions. On the first three questions, the plaintiffs' contention was sustained.

622, that a right of action for the conversion of personal chattels might be assigned, so as to vest a property in the assignee, and enable him, under the provisions of the Code, to maintain the action. This was in accordance with *Gillet v. Fairchild*, 4 Denio, 80, and *Hudson v. Plets*, 11 Paige, 180, and I have no doubt of its correctness. But this is a different case, and depends, as we shall see, upon different principles. The maxim of the common law is, *actio personalis moritur cum persona*. This principle was not originally applied to causes of action arising out of the breach of a contract. These were parcel of the personal estate in respect to which the executor or administrator represents the person of the deceased; and is in law his assignee.¹ But as to this class of rights of action, late cases have somewhat qualified the rule, and it is now well settled that an executor or administrator can not maintain an action upon an express or implied promise to the deceased, where the damage consists entirely of the personal suffering of the deceased, whether mental or corporeal. Actions for the breach of a promise of marriage, for unskillfulness of medical practitioners contrary to their implied undertaking, the imprisonment of a party on account of the neglect of his attorney to perform his professional engagement, fall under this head, being considered virtually actions for injuries to the person.² But all actions arising *ex delicto*, were governed by this maxim, until the statute 3 Ed. III., ch. 7, changed the rule respecting actions of trespass *de bonis asportatis*, authorizing such suits to be maintained by executors where the taking was in the lifetime of their testator. Another act, passed in the fifteenth year of the same reign (ch. 5), gave the like actions to administrators. These statutes have been greatly extended by an equitable construction, as will be seen by the cases collected in Williams' Treatise on Executors, vol. 1, p. 670; but I do not find that an action on the case for a deceit has ever been considered as within the purview of the statutes. It was not until a late period that executors or administrators were enabled to maintain an action for injuries to the real estate of the deceased. Such remedies were given by the statute 3 and 4 William IV., ch. 42. Broom's Leg. Max., 405. The revised statutes of this state have proceeded on the assumption that by the common law, actions for a tort could not be maintained by personal representatives. Hence we find it enacted that "executors and administrators shall have actions of trespass against any person who shall have wasted, destroyed, taken or carried away, or converted to his own use the goods of their testator or intestate in his lifetime. They may also maintain actions for trespass committed on the real estate of the deceased in his lifetime." 2 R. S. 114, § 4. If it be true that the executors or administrators are, as was said by Lord Abinger in *Raymond v. Fitch*, the testator's assignees, it is

¹ Citing, *Raymond v. Fitch*, 2 Crompt., Mees. & R. 588, 597; 1 Williams on Ex'rs, 677; Broom's Legal Maxims, 702.

² Citing, *Chamberlain v. Williamson*, 2 Maule & Selw. 408.

fair to assume that they take whatever of a personal nature the deceased had which was capable of assignment, and that the power to assign and to transmit to personal representatives are convertible propositions. Upon the reason of the thing this should be so, for no good title can pass to an assignee of an interest which dies with the person of the assignor. This distinction has been made the foundation of several judicial decisions. Cowen, J., said, in *The People v. The Tioga Common Pleas*, [1837] 19 Wend. 76, "I have never been able to find any case in England which, in respect to personal estate, has given the assignee a greater right than would go to an executor, none which vests in him a right of action for a personal tort, or any other mere tort." In *Sommer v. Will*, [1818] 4 Serg. & Rawle, 19, 28, the action was for a malicious abuse of legal process against property. The plaintiff before bringing the action had made an assignment under an insolvent act of all his *estate, credits and effects*. It was objected that he had parted with his right of action. The court, however, held that it was not the subject of an assignment under the insolvent act. They say that the cause of action was neither estate, credits or effects; that it was a personal action, that would die with the person. They add, "If it passed by the assignment his death would not affect it." The same doctrine was laid down in *North v. Turner*, 9 Serg. & R., 244. It was an action of trespass *de bonis*, and the question was whether an assignment by one of the plaintiffs *pendente lite*, accompanied by the payment of the defendant's costs, qualified him to be a witness—the courts in Pennsylvania allowing parties to the record, when not interested, to be witnesses. The court held that the assignment was effectual to divest him of interest; and they say that the rule, holding the right of action for personal injuries not to be assignable, "does not hold with respect to a trespass committed against the party's goods, the remedy for which survives to his personal representatives, by the statute 4 Ed. III., ch. 7, which clearly shows that such a cause of action is separable from the person of the owner." And Story, J., *Comegys v. Vasse*, 1 Pet., 213, remarked that it might in general be assumed "that mere personal torts, which die with the party and do not survive to his personal representatives, are not capable of passing by assignment."

These cases certainly furnish a respectable amount of judicial authority, and I think warrant us in holding, that any interest to which the personal representatives of a deceased party would not succeed, is not the subject of assignment *inter vivos*. The subject is one of great practical importance, since the Code of Procedure has authorized actions by assignees of a chose in action; and I am glad to find a rule laid down, of easy application, which will furnish a ready solution of many questions upon which the courts of original jurisdiction have differed in opinion. I may mention an additional case from the supreme court of Pennsylvania, upon the general question. *O'Donnell v. Syebert*, 13 Serg. & R., 54, 56, was an action for an excessive distress. It was held

that the cause of action could not be assigned. "It is not," say the court, "an action of contract *or of property*." The amendment made, in 1851, to the 111th section of the Code seems to have been designed to correct an erroneous construction sometimes given to the section as originally enacted, by which all causes in action were held to be assignable; but I do not think the amendment bears upon the present question. If I am right in what has been said the instrument executed by Gray to Zabriskie did not pass any interest.

(5.) Although Gray, on the assumption that he had not parted with his interest, was a necessary party to the action, the defendant might, notwithstanding, consent to waive the objection and litigate the case upon the merits. Under the former system, the defendant could not in actions *ex delicto* object to the non-joinder of one who ought to have been made a party plaintiff, except by plea in abatement,¹ and the Code of Procedure provides that where there is a defect of parties apparent upon the face of the complaint, the defendant may demur; and that where such an objection exists, but it does not appear by the complaint, it may be taken by answer, § 144, subd. 4, and § 147; but if no such objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, § 148. A dilatory defence, which a plea in abatement is considered to be, is not favored; but he who is entitled to avail himself of it must interpose it promptly, according to the established forms. Here the facts were fully disclosed by the complaint, and the defendant could have demurred. The authority to object by way of answer is, in terms, limited to cases where the fact does not appear in the prior pleading. When, therefore, the last section which I have quoted declares that if the objection is not taken by demurrer or answer it shall be considered as waived, it means that if it be not taken by demurrer where that mode is proper, or by answer in cases where that is the appropriate method, it is waived. This construction will give full effect to all the language, and will, besides, compel the defendant to take his ground with the promptness inculcated by the rule of pleading to which I have referred. I observe that it has been determined at a special term in the 5th district that matter in abatement must be pleaded separately, prior to the putting in a plea in bar. *Gardiner v. Clark*, 6 How. Pr. 449. The reasoning of Mr. Justice W. F. Allen in that case commends itself to my judgment, and individually I should be ready to approve its correctness, but it is unnecessary for the court in this case to pass upon that question. The defendant must be held to have waived the objection to the non-joinder of Gray by omitting to demur.

*Judgment affirmed.*²

¹ *Citing*, 1 Saund. 251, 291, note (g) and note (n); *Gilbert v. Dickerson*, 7 Wend. 451.

² On the remaining question, the discussion of which is omitted, it was held that where a defendant permits one or more of several joint tenants to sue alone in tort, by not pleading the joint tenancy in abatement, the recovery should be for the damage sustained by all the joint tenants. Otherwise if the suit is by one or more of several tenants in common.

Criticised (on the ground that the decision is based on the common law and ignores a

BYXBIE ET AL. *v.* WOOD.

COURT OF APPEALS OF NEW YORK, JUNE, 1862.

[24 N. Y. 607.]

Appeal from the Superior Court of New York city. The plaintiffs, as assignees of Edward E. Marvine, sued the defendant to recover from him certain sums of money, which it was claimed he had obtained from Marvine by means of various false statements and representations; which representations and statements were also characterized in the complaint as fraudulent. One of them was as to the price of a barque, which the defendant represented to have cost him \$12,000, but which, in fact, had cost but \$4,000. For a half interest in the barque, Marvine, by a sealed contract, agreed to pay \$6,000. The defendant and Marvine embarked in a joint venture, which consisted in the purchase and fitting out of the barque and supplying her with a cargo of a very miscellaneous character for a voyage to California. It was stated in the complaint that the defendant, by whom the purchases were made, falsified the accounts of such purchases, so as to represent himself to have paid out a much larger amount than he actually had; and that, upon the basis of such false accounts, Marvine paid to the defendant, upon a settlement, as his share of the expenses of the adventure, \$6,559.62 more than was really due from him; which sum, with interest, the plaintiffs claimed to recover. The complaint also stated that the defendant exhibited to Marvine, as an inducement to enter into the adventure, a letter purporting to have been written by one T. O. Larkin to the defendant, apprising him of the discovery of gold in California, and recommending the shipment of an assorted cargo to that territory, as likely to be attended with enormous profit,

To this action the defendant, by answer, interposed various defences:

1. That Marvine had not assigned the claim, but was still the true party in interest;
2. That all the statements made, and accounts rendered with such statements, were true, and the defendant had received only the money he was entitled to, and that the accounts were fairly settled;
3. That Marvine had not paid the amounts claimed, as some of

New York statute whereby the cause survived and therefore should have been assignable): *Fried v. New York Central R. R.* (1858), 25 How. Pr. 285; *Jackson v. Daggett* (1881), 24 Hun, 204. And see *Haight v. Hayt* (1859), 19 N. Y. 464, 465.

Accord (on the ground that the cause does not survive, at common law or by statute): *Slauson v. Schwabacher* (1892), 4 Wash. 783 [action by assignee of an insolvent debtor for injury to the business credit and reputation of his assignor from an alleged malicious levy of an attachment prior to the assignment]; *Farwell Co. v. Wolf* (1897), 96 Wis. 10, given in text, *infra*.

On the extension of the assignability of a right in tort through the statutory extension of its survivability see, *Vimont v. Chicago & Northwestern Ry.* (1886), 69 Iowa, 296, given in text, *infra*, and the notes thereto.—*Ed.*

the property in which, (at an estimated value,) part payment was made, was subject to certain liens. It was further claimed on the trial that by a motion for a non-suit, the defendant raised the point that the claim was not assignable, and also the point that Marvine ought to have been made a party plaintiff to the suit, and, therefore, the plaintiffs could not recover, because there was a defect of parties.

The cause, when at issue, was duly referred to three referees, who proceeded to hear the same, and in the course of the trial admitted some evidence to which the defendant objected, and, on its admission, excepted thereto; and at the close of the trial the referees made a detailed report of their findings of fact and conclusions of law, ending with an award of judgment in favor of the plaintiffs. From the judgment, entered on that report, the defendant appealed to the Superior Court at general term. That court affirmed the judgment, and from such judgment of affirmance the defendant appealed to this court.

John W. Edmonds, for the appellant.

Wm. Curtis Noyes, for the respondents.

GOULD, J. . . .¹ To the claim that there was a defect of parties, in that Marvine was not made a party plaintiff, there is a complete answer in law, in that such a point must be expressly raised either by demurrer or answer, and it is not raised in either way. Code § 144-148.

That Marvine was the real party in interest is expressly negatived, as matter of fact, by the ninth finding of the referees, that he "*duly assigned and transferred* to the plaintiffs all claims and demands, which he had against the defendant, arising out of such adventure," &c., in terms covering all the referees sustained as a cause of action. The question, (in any case,) whether the plaintiff is the true party in interest, or whether the title under which he sues is a mere sham, is, of course, one that every defendant is entitled to try. And if he relies upon facts, instead of, or beyond, or in contradiction to, the plaintiff's paper title or assignment, the question is not one of law for the court, but one of fact on which the jury are to pass. In this case the referees have so passed, and the finding is final.

We are thus brought to the consideration of the chief ground taken on the part of the defendant, which is, that the cause of action, as laid in the complaint, was founded on fraud and deceit, and that such an action was for a tort of such a nature that the cause of action is not assignable. The authorities cited by the defence in support of this position, *Allen v. Addington*, 7 Wend. 9; *Zabriskie v. Smith*, 13 N. Y. 333, go far to answer the position; since they show just what the action is, and that it is not for false and fraudulent representations by which the defendant himself obtained money or property, but for such representations, as to the credit and responsibility of a third person, as induced the plaintiffs in those suits to sell property on credit to such

¹ Part of the opinion, on other points, is omitted.

third person, and thereby the plaintiffs were injured, though neither the defendant nor his property were benefited. So far as the defendant's act and the defendant himself were concerned, it was a mere naked tort; and even as to these decisions, it may be advisable to see how fully they accord with the Revised Statutes. 2 R. S. 447, §§ 1, 2.

Such is by no means the case before us. The facts as found by the referees are, that, by false representations and the alteration of bills and vouchers, the defendant himself received from Marvine large sums of money to which he was not entitled; and they have found that the plaintiffs are entitled to recover, not for any fraud, but for the money which the defendant had so received, and which, being so received, he had no right to retain. This state of facts does not necessarily require an action to be brought for the tort, even if it allows one to be so brought. Such facts always raised, in law, the implied promise which was the contract-cause of action in *indebitatus assumpsit* for money had and received. Having money that rightfully belongs to another, creates a debt; and wherever a debt exists without an express promise to pay, the law implies a promise; and the action always sounds in contract.

Under the Code this implied promise is treated as a fiction, and the facts (out of which the prior law raised the promise) are to be stated without any designation of a form of action; and the law gives such judgment as, being asked for, is appropriate to the facts. Of course, we can not now say that a particular phrase makes a particular form of action, so that a party by its use, may shut himself out from the remedy which his facts would give him. He may, indeed, so utterly misconceive his rights as to make his complaint not at all adapted thereto; so that his offered proofs (or even his proofs put in without objection) would require an entirely new complaint to reach them, and then no court can give him judgment.

In the case before us, the assignment to the plaintiffs purports to be of "claims and demands, either for *moneys received or owing*, or for *false and fraudulent representations*, or *deceit*, which I have &c., by reason of" the transactions between Marvine and Wood. The complaint says that Wood made false and fraudulent representations to Marvine about the moneys paid for joint account, and "by means of such false representations fraudulently and deceitfully obtained" property &c., from Marvine; and the plaintiffs (as assignees of Marvine) "*therefore demand judgment against the defendant for the sum of \$6,559.62, and interest from October, 1848.*" It would hardly seem that this is a complaint for a mere naked tort in an action claiming damages for the wrong. And unless it be so, necessarily and unavoidably, the ends of substantial justice would require us to disregard the words that charge a wrong.

Yet even this seems not now a necessary ground for sustaining this judgment. What valid objection is there to treating these words, ("fraudulently and by deceit,") as mere inducement, containing a state-

ment of the facts which show that Marvin's payment was not a voluntary one with knowledge of the facts, and that, therefore, he was entitled to sue to recover back the money; and thus anticipating a defence? How, without some such statement, was he to show that it was not a voluntary payment, or that his settlement of the accounts was not final and binding on him? If, to avoid either of those objections, in an action to get back the money paid, he could have proved the actual facts, there can be no objection to his stating them in his complaint. But conceding that a tort be one of the elements that go to make up this cause of action, it will be found to be assignable. It will be seen to be of that class of torts the right of action for which would survive to the personal representatives of the claimant; and "the power to assign and to transmit to personal representatives are convertible propositions." *Zabriskie v. Smith, supra*. And, further, it is, within the decisions both before and since the code, of a nature that was formerly assignable in equity, and is now assignable at law. In *McKee v. Judd*, (2 Kern., 625,) it is held "that demands arising from injuries *strictly personal*, (whether arising from tort or contract,) are not assignable, but that *all others are*." 13 N. Y., 333-335, 336; 15 N. Y., 432. And by the Revised Statutes (2 R. S., 447, § 1), "for *wrongs* done to the *property, rights or interest* of another, for which an action might be maintained, &c., such action may be brought after the death of the person injured, by his executors or administrators, in the same manner, &c., as actions founded upon contracts. And the exceptions to this broad general rule are contained in the next section, and are confined to injuries to the person or character. In this case, if the action be for the fraud and deceit, it is for a "wrong done to the *property*," &c., of Marvin; and by the statute could be brought after his death by his personal representatives, and is assignable.

The defendant's counsel claims that the findings of fact by the referees do not sustain the judgment, because they have not found the fraud, which is alleged in the complaint. It is quite true that they have not found the fact of fraud; but as we hold that the action is sustainable without there having been any fraud, and merely as an action for money, which the defendant has no right to retain, the failure to find fraud is no objection to the validity of the judgment, and it is to be affirmed as not being an action for the fraud. It is proper to note another point taken for the defence: that, as the assignor of the plaintiffs, Marvin had settled the account and receipted it as correct, the right to set aside that settlement, and avoid the effect of it as a substantial release to the defendant, and the right to avoid the effect of fixing the price, by the sealed contract to give \$6,000 for one-half of the barque, were personal rights, which Marvin himself must assert, and which he could not assign. This is conclusively answered, by holding, as we do, that an account settled, or a release executed, is not the title by which the defendant received, or held the money, but

a mere acknowledgment that, the items being true, the balance is correct, or that upon those stated facts the defendant is liable to pay the money: that the contract of purchase of the barque is not avoided, but the undue price is examined, and the excess is to be recovered as money had and received to the use of the plaintiff; and, in suing for the money, it is entirely immaterial, (in our present modes of pleading,) whether the plaintiff anticipates what would be matter of defence, and says in advance that it was so obtained as to be invalid, and no defence, or whether he omits all mention of it, and on the trial, when it is interposed as a defence, proves the fraudulent obtaining of it which makes it void, and no defence. The right of action is not founded on it; and it bears no resemblance to an instrument through which is to be made the title which is to found an action, and which requires to be reformed, or set aside, to obtain that title.

In any view, therefore, the judgment of the Superior Court should be affirmed.

The court did not pass upon the question whether, assuming action to be for tort, it was of such a character as to be assignable.

*Judgment affirmed.*¹

JOHN V. FARWELL COMPANY v. WOLF AND OTHERS.

SUPREME COURT OF WISCONSIN, FEBRUARY 23, 1897.

[96 Wis. 10.]

Action to recover damages for an alleged conspiracy to defraud.

The complaint sets forth, in substance, that in the summer of 1893 the defendants entered into a fraudulent conspiracy to defraud wholesale dealers in goods, wares, and merchandise; that the scheme agreed upon was that one of the defendants, Moses Josephson, should purchase goods of such dealers on credit, without any intention of paying for the same, have the same delivered at his store in New Lisbon, Wisconsin, and that the goods should then be sold, conveyed away, and concealed in such a way that the proceeds might be divided between the co-conspirators; that pursuant to the conspiracy, in August and September, 1893, goods, wares, and merchandise to the amount of \$434.83 were purchased of the plaintiff in the name of Josephson, were delivered to him and disposed of for the benefit of the defendants, pursuant to this fraudulent scheme; that none of these goods have been paid for; and that plaintiff has thereby been damaged in the sum of \$434.83 and interest; that, further, in pursuance of this fraudulent conspiracy, other goods, wares, and merchandise were at various times, in the year 1893,

¹ See also, *Gordon v. Hostetter* (1867), 37 N. Y. 101; *Sparman v. Krim* (1880), 83 N. Y. 247, 250; *Salisbury v. Howe* (1882), 87 N. Y. 128, 134.

particularly stated, purchased of some twenty-four different persons, copartnerships, and corporations, the name of each being given, with the amount purchased; that all these goods were delivered to said Josephson, and disposed of for the benefit of the defendants, pursuant to the aforesaid fraudulent scheme; that none of these goods have been paid for; and that before the commencement of this action these sellers, for a valuable consideration paid to them respectively, sold, assigned, and conveyed to plaintiff their respective claims for the goods so sold and delivered, together with their respective causes of action for damages against defendants on account of the aforesaid conspiracy.

The aggregate of plaintiff's claim for damages for goods procured of it through this fraudulent scheme, and of the several other claims mentioned, amounted to \$5,102.32, for which sum judgment was demanded, with interest. The defendants, except Josephson, joined in an answer to the complaint.

On the trial a jury found for the plaintiff on all the issues, and assessed the damages at the full amount claimed, which, with interest, made \$5,432.25. Judgment was rendered on the verdict, and defendants appealed.¹

Blum & Blum, and *J. M. Morrow*, for appellants.

Lewis & Briggs, and *J. J. Hughes*, for respondent.

MARSHALL, J. . . .

The further point is made that the several alleged assigned claims for damages were not assignable; therefore that the recovery thereon can not be sustained. Applying the usual test of assignability,—that is, whether the claims are such as survive to the personal representatives, we start with the presumption that it will not be seriously contended that such claims survive at common law. To be sure, counsel cite various adjudications to show that claims for injuries to personal property do so survive, but they have no application to this case. This is not a claim for injury to personal property as such. At most it is only an injury to a property right. *Webber v. Quaw*, 46 Wis. 118, and *McArthur v. G. B. & M. C. Co.*, 34 Wis. 139, are confidently referred to, but they are cases of injuries to property, strictly so called, and follow the New York authorities respecting the assignability of such claims.

In most states, as here, there is a statutory extension of the common law rules, and authorities are very numerous respecting the subject, many of which, however, have very little application to this case because of statutory differences. The New York statute provides that "*actions for all wrongs done to the property rights or interests of another shall survive.*" It is held that this language is so broad and comprehensive as to cover all injuries to rights of property, and is not confined to injuries to property as such; that it includes actions for damages for conspiracies to defraud and damages for deceit.

¹ The reporter's statement has been slightly abridged.

² Part of the opinion is omitted.

Bond v. Smith, 4 Hun, 48; *Haight v. Hayt*, 19 N. Y. 464; *Lyon v. Park*, 111 N. Y. 350; *Brackett v. Griswold*, 103 N. Y. 425. These cases turn entirely on the meaning of the significant words, "property rights and interests." Our own statute (sec. 4253, R. S.), so far as it relates to this subject, is as follows: "*Actions for damages done to real and personal estates*" shall survive. A similar statute existed in Massachusetts at a very early day, and was adopted from that state by Michigan and this state as well. It received construction in the state of its origin, before adoption here; hence, under a familiar rule, such construction was, in effect, a part of the statute itself at the time it was ingrafted upon and became a part of our system.

The whole subject goes back to St. 4 Edw. III. c. 7, [1330]. Before that, in England, no action for injury to personal property survived. By such statute, says MR. JUSTICE PUTNAM, in effect, in *Holmes v. Moore*, [1827] 5 Pick. 257, an action for goods carried away survived, and by equitable construction it was held that the remedy for a wrong done to personal property, though such property was not actually carried away, survived, and such statute, with such construction, was adopted by the state of Massachusetts from the English statute. Following *Holmes v. Moore*, in *Read v. Hatch*, [1837] 19 Pick. 47, an action for damages for inducing plaintiff, by fraudulent representations respecting the insolvency of another, to sell property to such other, SHAW, C. J., in delivering the opinion of the court, said, in effect, that a fraud injuriously affecting a person's estate, is not an injury to such person's personal estate, within the meaning of the statute; that to hold otherwise would be to give to the statute a forced construction, and not conformable to the intent of its framers; that to uphold such construction would, in effect, be to say that every injury by which one may be prevented, from pecuniary gain or subjected to pecuniary loss would, directly or indirectly, be a damage to his personal property. The statute must have a more limited construction, and be confined to damages done to some specific personal estate of which one may be the owner. The mere fraud or cheat by which one sustains a pecuniary loss can not be regarded as damage done to personal estate. The construction thus given to the statute has never been departed from. See *Cutting v. Tower*, 14 Gray, 183; *Leggate v. Moulton*, 115 Mass. 552; *Brush v. Sweet*, 38 Mich. 574; *Dayton v. Fargo*, 45 Mich. 153.

The only case previously decided in this court that throws any light on the subject is *Murray v. Buell*, 76 Wis. 657, cited by respondent. Though it is in harmony with the foregoing, it did not involve the precise question under discussion. The contention there appears to have been that an action for damages for a conspiracy to injure another's business was assignable as an injury to the person of such other. This court held that it could not be so considered, but was an injury to such other's business interest merely; therefore not assignable. It did not

occur to the able counsel who presented the case in this court, or to the present chief justice, who wrote the opinion, that such a cause of action could be held assignable as an injury to personal estate. Therefore the subject was not discussed, though to say, as was in substance said in such opinion, that such a cause of action is for an injury to business interests, therefore not assignable, is quite equivalent to saying that it is an injury to property rights, as distinguished from an injury to specific property, therefore not assignable.

The result of what has been said is that the several assigned claims for damages, upon which the plaintiff recovered, did not pass to plaintiff by the attempted assignment thereof, and that such recovery can not be sustained.

The result of the foregoing is that the plaintiff is not entitled to recover on any claim for damages other than that caused by its sale of goods to Josephson on and prior to the 16th day of September, 1893, amounting in value to \$434.83. Therefore a new trial must be had, unless plaintiffs consent to take judgment for such amount, with interest and costs.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial, unless plaintiff elects to take judgment for \$434.83 and legal interest thereon from the 16th day of September, 1893, together with the costs of the trial heretofore taxed in the circuit court.¹

¹ Motion for a new hearing denied, April 30, 1897.

NOTE.—THE STATUTORY EXTENSION OF THE SURVIVABILITY OF CAUSES OF ACTION.

In recent years, the survivability of causes of action has been greatly and variously extended by the legislatures. Thus, it is now provided in Massachusetts, that "in addition to the actions which survive by the common law, the following shall also survive: actions of replevin; of tort for assault, battery, imprisonment, or other damage to the person, for goods taken and carried away or converted by defendant to his own use, or for damage done to real or personal estate." (*Pub. Stats.*, ch. 165, § 1.)

In Connecticut, "all actions for injury to the person, whether the same do or do not instantaneously or otherwise result in death, to the reputation, or to the property, and actions to recover damages for injury to the person of the wife, child, or servant of any person, shall survive to his executor or administrator." (*Gen. Stats.*, § 1008.)

In Ohio, through an amendment in 1893, "in addition to the causes of action which survive at common law, causes of action in *mesne* profits, or for injuries to the person or property, or for deceit or fraud, shall also survive." (*90 Ohio Laws*, p. 140; *Rev. Stats.*, § 4975.) A similar enactment is found in Kansas. (*2 Gen. Stats.* [1897], 214.)

In Iowa, "all causes of action shall survive, and may be brought notwithstanding the death of the person entitled or liable to the same." (*Code*, '97, § 3443.)

The statutes of several states declare that all causes of action except those for *libel and slander* shall survive; and in others still there are wide departures from the common law rule as to the survivability of causes of action. Very seldom, however, is there an express enactment as to their *assignability*.

If there is no such enactment, does the common law test of assignability, as given in the foregoing cases, still hold? In other words, was the *survivability* of a cause of action the true test of its *assignability*, or was it only a convenient test, reasonably accurate at the time when made, because of the then existing limits of the doctrine of survivability? Granted that a chose in action which does not now survive can not be assigned, does it follow that a chose in action which does now survive, because of express enactments, is therefore now assignable, although formerly it was not assignable?

VIMONT *v.* THE CHICAGO & NORTHWESTERN RAILWAY
COMPANY.

SUPREME COURT OF IOWA, JUNE TERM, 1886.

[69 *Iowa*, 296.]

Plaintiff as assignee of one Darby Carr, brings this suit to recover damages for a personal injury sustained by said Darby Carr while in defendant's employ as a laborer on a gravel train, and which was occasioned, as it is alleged, by the negligence of his co-employees. This appeal is from the order of the circuit court sustaining a demurrer to certain counts of defendant's answer.

N. M. Hubbard and Whiting S. Clark, for appellant.

Nourse & Kauffman, for appellee.

REED, J.—It is alleged in the third paragraph of the answer that the assignment by Carr to plaintiff of the claim on which the action is brought was executed, delivered, and accepted by plaintiff, and its acceptance took effect, in the state of Illinois, and that by the common law, which is in force in that state, the assignment of said cause of action is void. The question raised by the demurrer to this paragraph is whether the plaintiff is precluded by these facts from recovering on the cause of action sued on. The assignment under which plaintiff claims is set out in the petition, and it is of a cause of action which is alleged to have arisen under the laws of this state in favor of an employe of defendant on account of a personal injury sustained by him in consequence of the negligence of a co-employe.

It may be conceded for the purposes of this case, we think, that a claim for damages arising out of a personal tort, and having its origin where the common law is in force, is not assignable before being reduced to judgment. The ground upon which it is held that such claim is not assignable is that it is a mere personal claim in favor of the injured party, and that it does not become part of his estate, or descend to his representatives, but terminates at his death; and consequently it has no value which can be so estimated as to form a consideration for a sale, and there is in it no element of property to make it the subject of a grant or assignment. See *Rice v. Stone*, 1 Allen, 566; *People v. Tioga Common Pleas*, 19 Wend. 73. The contract of assignment of such claim between parties otherwise competent to contract is void at common law, then, not because of any incapacity of the parties to enter into the contract, but because the claim itself is not the subject of contract.

Under the statute of Iowa, however, such claims are given a character entirely different from that sustained by them when arising under the common law. They are not merely personal claims in favor of the parties sustaining the injuries, and they do not terminate with their

death, but become a part of their estates and descend to their representatives, and actions thereon may be maintained by the representatives.¹ They are also assignable under the law of this state.²

If Carr, plaintiff's assignor, had a valid claim for damages on account of the alleged injury, such claim had the qualities of a property right or interest. It constituted a part of his estate, and was capable of being transferred within the state by assignment, and at his death it would have descended to his representatives, and his assignee or representative could have maintained an action in his own name for its enforcement.

It seems to us that the mere carrying of this claim into another state could not have the effect to change its character or take from it any of its qualities, but that it would retain its properties notwithstanding the removal of the person in whose favor it arose to another state or country; and that, as it had the properties which rendered it assignable imparted to it by the laws under which it arose, it would retain those properties when taken beyond the jurisdiction of those laws, and would be assignable anywhere.

The other questions raised by the demurrer are the same as those determined in *Vimont v. Chicago & N. W. R. Co.*, 64 Iowa, 513, and the ruling of the circuit court thereon is in accord with our holding in that case.

ADAMS, J., dissenting.

*Affirmed.*³

¹ *Citing*, Code, §§ 2525-2527; *Carson v. McFadden*, 10 Iowa, 91; *McKinley v. McGregor*, id. 111; *Shafer v. Grimes*, 23 Iowa, 530.

² *Citing*, *Weire v. City of Davenport*, 11 Iowa, 49; *Gray v. McCallister*, 50 Iowa, 497.

³ For the opinion on a re-hearing, dealing with other questions, see *infra*.

NOTE.—EFFECT ON THE ASSIGNABILITY OF A CHOSE IN ACTION IF A STATUTE MAKES IT SURVIVE.

Accord, with the general doctrine of *Vimont v. Chicago Ry. Co.*: *Hawley v. Chicago Ry. Co.* (1886), 71 Iowa, 717, 719. *Lehmann v. Farwell* (1897), 95 Wis. 185, 189: "If the cause of action [for a personal injury] survived, it was assignable. *Webber v. Quaw*, 46 Wis. 118. It is well understood that such an action does not survive at common law; hence the question is whether it survives under Sec. 4253 R. S., as amended by ch. 280, Laws of 1887. . . . The words of the statute are plain. They are to the effect that an action for assault and battery, false imprisonment, or other damage to the person, shall survive. The injury resulting from being run over by a street car is certainly 'other damage to the person,' and it is damage of the same character as the damage resulting from an assault and battery; that is, it is physical pain and suffering."—*Per WINSLOW, J.*

So where a claim for a personal tort is made assignable after verdict and before judgment. *Kent v. Chapel* (1897), 67 Minn. 420, 422: "Was this verdict [in an action for an assault] assignable? In *Hunt v. Conrad*, 47 Minn. 557, 50 N. W. 614, it was held that a right to recover damages for a personal tort was a mere personal right and not assignable even after verdict and before judgment. This decision seems to have been based upon what was considered by the court principles of the common law, and its attention was evidently not called to G. S. 1878, c. 67, § 41, which in part reads as follows: 'After a verdict of a jury, decision or finding of a court, or report of a referee in any action for a wrong, such action shall not abate by the death of any party.' The legal effect of this statute is not discussed or adverted to in *Hunt v. Conrad*, and even if sound in enunciating the common law doctrine, it is inapplicable to the statute which we have quoted, and which is the same as G. S. 1894, § 5171. In the

later case of *Cooper v. St. Paul C. R. Co.*, 55 Minn. 134, 56 N. W. 588, it was held that where the party dies after the rendition of a verdict in an action brought to recover for personal injuries sustained through the carelessness or negligence of the defendant, the action does not abate, but may be continued by or against the personal representatives of the deceased, under the provision of the statute which we have above quoted.

"The language used in our statute is substantially that in Wait, Code N. Y., § 121, and it was held under that code that 'a claim for damages for a purely personal wrong, while it remains unliquidated and unascertained by a verdict, dies with the person; but the intent of the section of the code above cited seems to be to prevent that result after the claim has been ascertained by a verdict. In that case the verdict becomes property which passes to the representatives of the deceased, as a judgment would at common law. It becomes the duty of the executor or administrator to defend it for the benefit of the estate.' *Wood v. Phillips*, 11 Abb. Pr. (N. S.) 1.

"In the case at bar, the claim for damages became liquidated and determined by the verdict. There was no further uncertainty about the claim, and the statute, by its terms, recognizes and preserves the right of entering judgment upon it. This right is a valuable one, and the verdict should be regarded as a property right—as much so as a verdict rendered for violation of a contract, or other causes of action not arising out of tort. The verdict was therefore assignable."—*Per* BUCK, J.

The traditional authority of this test is apparent in *Slauson v. Schwabacher* (1892), 4 Wash. 783. The supreme court were construing this enactment of the Washington Code: "All other causes of action [except those for wrongful death, on which causes, it was declared in § 703, the personal representative could 'maintain an action at law'] by one person against another, whether arising on contract or otherwise, survive to the personal representatives of the former, and against the personal representatives of the latter." (Hill's Code, '91, § 704; Code '97, § 5695). Said the court, *per* DUNBAR, J., p. 787: "We think the only fair construction of § 703 is that the legislature intended to confer upon personal representatives certain rights in contradistinction to the rights of heirs, and that in § 704 they were legislating with reference to causes of action which already survived, and were not attempting to announce what causes of action *should* survive. If this theory be not true, then the enactment of § 703 was useless, for it could have been expressed in § 704 by simply the omission of the words 'cause of.' If the appellant's construction is correct, there is no limit whatever to causes, for causes of action for assault, slander, and other purely personal causes would survive; and this would be so wide a departure from the established rule, that the legislature would hardly be deemed to have intended it without plainly expressing such intention." It was accordingly held that a cause of action for the malicious levy of an attachment did not survive under that statute, and therefore could not be assigned.

Contra (that the survivability of a chose in action is not always the test of its assignability): *North Chicago Street R. R. Co. v. Ackley* (1898), 171 Ill. 100 (given in text, *infra*). See also, *Rice v. Stone* (1861), 1 Allen (Mass.), 566, where a claim for an injury to the person was held not assignable before judgment thereon, although after a verdict; and the court, *per* CHAPMAN, J., remarks (p. 571): "There can not be the same objection to the transmission of such a claim to executors and administrators as to its assignment to strangers; and by our recent legislation actions for damage to the person survive, but we do not consider this as materially affecting the question whether such rights of action may be assigned to a stranger." To the same effect is *Linton v. Hurley* (1870), 104 Mass. 353; and compare *Bennett v. Sweet* (1898), 171 Mass. 600.

It is to be noted also that in *Sanborn v. Doe* (1891), 92 Cal. 152, and *Archer v. Freeman* (1899), 124 Cal. 528, a mere right to complain of fraud is held not assignable, on grounds of public policy, and without reference by the court to any question of survivability. And in *Pardoe v. Iowa State National Bank* (1898), 106 Iowa, 345, the Supreme Court of Iowa has recently said: "In view of the language of the statute [United States Rev. Stats., § 5198, declaring that if an unlawful rate of interest has been paid to a national bank, 'the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of interest thus paid'] and the general policy of the law to make personal to the debtor the right to take advantage of usury, we are of opinion that the statute under consideration does not give to a debtor who has paid usurious interest the right to transfer his claim therefor by an ordinary sale or assignment of his right, and that the plaintiff did not acquire any right, as against the defendant, by the assignment which the heirs of Gaughran [for whose estate the unlawful interest had been paid] made to him."—*Per* ROBINSON, J., p. 351.

And generally, on the test of assignability of a right in tort, see the remarks of Mr. Cyprian William in 10 *Law Quarterly Review*, 156-7 (1894): "A perusal of the judgments in the

American cases will show that there has been a tendency to take the rule of devolution of rights of action on bankruptcy as a guide. It has at all events been considered that rights of action which do not devolve either upon a trustee in bankruptcy or an executor can not be assignable; although in the case of *Grocers' Bank v. Clark* (1866), 48 Barb. 28, the argument was in a manner reversed, and it was held that a right of action for an injury to property was assignable, and therefore passed among the injured party's assets. In this country [England], however, the argument from analogy to the law of bankruptcy is open to the objection that it has been held in *Seear v. Lawson* (1880), 15 Ch. D. 426, that such rights of action as devolve upon a trustee in bankruptcy are assignable by the policy of the statute law of bankruptcy, although they might not have been assignable by the bankrupt himself.

"But in my humble judgment a better test of the assignability of a right of action in tort may be found by referring to the doctrines of the common law. This is simply the rule propounded by Wangford as long ago as 34 Hen. vi., that the duty of a thing *which is certain* may well be assigned over, coupled with the explanation afterwards adopted in determining the law of forfeiture on outlawry, that a right of action sounding in damages may be said to be certain when the measure of damages is certain.

"By the ancient common law, the king only could assign a chose in action directly, and he could generally assign whatsoever things were forfeited to him on outlawry or for felony. 17 Vin. Abr. 87, 88 (Prerogative M. C. 17). In the modern common law, it was established that a common person might assign a chose in action indirectly by empowering the assignee to sue in his name. By the ancient common law, the *limit of the king's power of assigning a chose in action was determined by the certainty or uncertainty of the thing*, and for the purpose of this limitation it appears that damages are a certain thing when their measure is certain. Is there any good reason why the same test should not be applied to ascertain the limits of a common person's power of indirectly assigning a chose in action? Especially when the settled law as to the assignment of a right of action in tort by subrogation points to the same rule; subrogation being a consequence of a contract of indemnity, and indemnity being only possible against a pecuniary loss measured by injury to or loss of property."—*Ed.*

THE NORTH CHICAGO STREET RAILROAD COMPANY
v. ACKLEY.

SUPREME COURT OF ILLINOIS, FEBRUARY 3, 1898.

[171 Ill. 100.]

Appeal from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding.

Appellee filed his bill against appellant, alleging that in 1891 Mrs. Mary Butler was injured while alighting from a cable car of the defendant, by reason of the negligence of the grip-man; that she employed the complainant as her attorney, upon a contingent fee, by a contract in writing, whereby he agreed to take the exclusive charge of the matter and prosecute such parties as he might deem liable for such injuries, and begin and prosecute diligently to final settlement such suits or legal proceedings as he might deem necessary; that he was to receive a sum equal to one-half the gross amount recovered or received on account of such injuries, and to secure the payment of such fee Mrs. Butler assigned to the complainant and his assigns one-half of such right of action, and agreed to assign in proper legal form, in

writing, upon request, one-half of any verdict or judgment which might be had or recovered by reason of such accident and injury ; that Mrs. Butler further agreed to pay the costs, and not to settle or compromise such claim, or have any dealings with any person in reference thereto other than such attorney, but if the matter were settled before the suit was placed on the trial call, the fees were to be less than one-half, in proportion to the work done up to the date of such settlement. This contract was signed and sealed by the parties September 2, 1891. The bill then recites a collateral verbal agreement, made at the same time, whereby the complainant agreed to employ associate counsel, and states that this written contract conveyed to the complainant the ownership of one-half of Mrs. Butler's right of action ; alleges that, relying on such assignment and covenants, the complainant hunted up witnesses, took their written statements and addresses, began a suit in September, 1891, engaged associate counsel, prepared the pleadings, watched the case when it was reached upon the first call, in April, 1894, had it then marked for trial, and watched it eight days on the trial call ; that on May 15, 1894, while it was on the trial call, the defendant, by one of its attorneys, called on Mrs. Butler and assured her that, notwithstanding her previous assignment of such cause of action, (of which notice to the defendant is charged), she had full power herself to release and discharge the defendant from all liability by reason of such injuries ; that she owed complainant only a small amount for his services ; that she might personally collect the whole amount which the company would pay, and that the company's attorneys would defend her from any suit Ackley might bring ; that thereupon the company's attorney paid her \$3,750 and obtained from her a full release, together with a letter to the complainant informing him of the settlement, and directing him to sign a stipulation of the settlement ; that on the day following, without notice to the complainant, the case was called up out of its order in the court in which it was on the trial call, and a judgment entered for \$3,750, which was satisfied in open court ; that the complainant has never received anything for his services ; that Mrs. Butler and the Railroad Company refuse to pay him anything, and that she is insolvent as he is informed and believes ; that by reason of these facts Mrs. Butler had no legal right to receive more than one-half of the money paid as compensation for such injury, and that the defendant was bound, after notice, to pay one-half of whatever amount was agreed upon in settlement of such claim, to the complainant, and that such right of the complainant could not be taken from him without his consent ; that there was due to the complainant from the defendant the sum of \$1,875, being one-half of the amount for which the settlement was made, with legal interest from May 15, 1894. The bill then prays that the defendant be decreed to pay to the complainant the amount alleged to be due, and for general relief.

On June 5, 1894, the appearance of the defendant was entered, and on June 30 a default was taken against it. On September 11 the court rendered a decree that the bill be taken as confessed, and that all matters and things therein stated were true; that the equities were with the complainant; that the court had jurisdiction of and over all the parties thereto and the subject matter therein, and that there was due and owing from the defendant to the complainant the sum of \$1,875, being one-half of the sum of \$3,750 which was paid to Mary Butler by the defendant, as alleged in the bill, and on motion of the complainant it was ordered and decreed that the complainant have and recover from the defendant the sum of \$1,875, together with cost of suit. A motion was made by the defendant to set aside the decree and for leave to file an answer at its cost, which was supported by affidavit to the effect that the defendant had a defence to the bill upon the merits of the whole of the complainant's demand, which motion was denied by the court. The defendant (appellant here) appealed to the Appellate Court for the first district, where the decree of the trial court was affirmed, and it prosecutes this appeal.

*Egbert Jamieson, and John A. Rose, for appellant.*¹

*L. M. Ackley, pro se.*²

MR. CHIEF JUSTICE PHILLIPS delivered the opinion of court:

Where the defendant to a bill in chancery has been defaulted and a decree *pro confesso* entered, that decree concludes the party only as to

¹ Counsel for the appellant made the following points:

A right of action for personal injuries is not assignable. *Railroad Co. v. Maher*, 91 Ill. 314; *Norton v. Tuttle*, 60 id. 134; *Prosser v. Edmunds*, 1 Y. & C. 481; *Rice v. Stone*, 1 Allen, 568; *Land and Loan Co. v. Speyer*, 138 Ill. 145; *Linton v. Hurley*, 104 Mass. 353; *Coughlin v. Railroad Co.*, 71 N. Y. 446; *Oliwell v. Verdenhalven*, 26 id. 116; *Averill v. Longfellow*, 66 Me. 237; *Swanson v. Mining Co.*, 13 Fed. Rep. 216; *Railroad Co. v. Railroad Co.*, 87 Ga. 388; *Hunt v. Conrad*, 47 Minn. 557; *Greenhood on Public Policy*, 474; *Boardman v. Thompson*, 25 Iowa, 487; *Lewis v. Lewis*, 15 Ohio, 715; *Elwood v. Wilson*, 21 Iowa, 523.

A decree *pro confesso* concludes the party only as to the averments to the bill. He may contest the sufficiency of the bill itself, and insist that the averments contained in it do not justify the decree. *Gault v. Hoagland*, 25 Ill. 241; *Railroad Co. v. Maher*, 91 id. 314.

A cause of action on a verbal contract, or for an injury to the person or property of another, is not assignable, so as to pass the right of action. *Railroad Co. v. Loeb*, 118 Ill. 203; *Railroad Co. v. Calkins*, 27 Ill. App. 55.

A contract between a client and the attorney, whereby the client shall not have the privilege of settling or discontinuing his suit without the assent of the attorney, is void. *Lewis v. Lewis*, 15 Ohio, 715.

² Counsel for appellee made the following points:

A right of action to recover damages for negligence resulting in an injury to property may be assigned, and an action at law therefor may be brought by the assignee in the assignor's name. *Insurance Co. v. Frost*, 37 Ill. 333; *Railroad Co. v. Middlecoff*, 150 id. 27; *Over v. Railroad Co.*, 63 Fed. Rep. 34; *Cunningham v. Railroad Co.*, 102 Ind. 478.

All such rights of action for a tort as would survive to the personal representatives may be assigned, so as to pass an interest. *Tyson v. McGuinness*, 25 Wis. 656.

All choses in action embracing demands which are considered as matters of property or estate, are now assignable either at law or equity. Nothing is excluded but mere personal torts, which die with the party. *Hoyt v. Thompson*, 1 Paige, 320.

All such rights of action for tort as would survive to the personal representatives may be assigned so as to pass an interest to the assignee, which he can enforce by suit at law. *Final v. Backus*, 18 Mich. 218.

the averments of the bill, and the sufficiency of the bill itself, and the averments contained in it, may be attacked as not justifying the decree. *Gault v. Hoagland*, 25 Ill. 241. The material inquiry therefore is, first, whether a right of action for personal injuries is assignable; and second, whether a contract by which the control of the party in interest over litigation carried on in his name or behalf is prevented is void.

By the common law, actions arising out of torts did not, in general, survive. The statute of this state has materially changed the rule with reference to actions which survive, and it is now the general rule in this country that causes of action arising from torts to property, real or personal, or injuries to the decedent's estate by which its value is diminished, survive and go to the executor and are assets in his hands, and such causes of action are assignable. But it is usually held that torts to the person or character, when the injury or damage is confined to the body or the feelings, and those contracts the breach of which produces direct injury and damage, both mentally and to the person, are, so long as they are executory, not assignable. The controversy here is whether an action for personal injuries is assignable.

Numerous authorities are referred to by counsel for appellee which lay down the rule that in many cases of torts to property causes of action may be assigned, and of those cases we cite the following: In *Jackson v. Daggett*, 31 N. Y. Sup. 204, an action against a sheriff for failure to return an execution was held assignable. *Dinney v. Foy*, 38 Barb. 18, was an action against a sheriff for neglecting to arrest a debtor upon an execution against his person, and the cause of action was held assignable. *Grant v. Ludlow*, 8 Ohio St. 51, was a bill of review to set aside a decree based on a commercial transaction. The case was relative to a mortgage, and the point made was, that the transaction was in the nature of a tort, and not transferable to executors or administrators, and died with the person. The court held that it survived—that the mortgage was assignable. *Robinson v. Weeks*, 6 How. Pr. 161, was an action for taking and converting personal property, brought by an assignee, and it was held that the assignment was good. *Hall v. Cincinnati Railroad Co.*, 1 Disney, 58, was a case that decides that under the Ohio code an assignee of a claim for damages resulting from injuries to personal or real estate may bring an action in his own name. *More v. Massini*, 32 Cal. 590, was a case wherein it was held that a claim for damage caused by a trespass on land is assignable. *Weire v. Davenport*, 11 Iowa, 49, was a case wherein it was held that a damage to realty is assignable. *National Exchange Bank v. McLoon*, 73 Me. 498, was a case which held good an assignment by an heir of the owner of a ship destroyed by the "Alabama", of his claim against the United States for such destruction. *Fried v. New York Central Railroad Co.*, 43 N. Y. Sup. 1, holds that the right of action for carelessly and negligently setting fire to and burning up grass, fences, and hay upon a farm is assignable. *Vimont v. Chicago and Northwestern Railroad Co.*, 64

Iowa, 513, was a case in which there was an assignment of the right of action for personal injuries to a resident of Iowa by a non-resident, and the question arose as to the validity of the assignment, on a motion to transfer the case to the United States Court, and the court held that such assignment was good, on the strength of *Gray v. Allen*, 4 Iowa, 497. *Zagbaum v. Parker*, 66 Barb. 341, was a case of false imprisonment, where there was an agreement to secure services by the assignment of a verdict, and the agreement was held good. This is under the New York code, under which champerty and maintenance do not exist. *Brady v. Whitney*, 24 Mich. 154, was an action in trover brought by a purchaser of a melodeon after the conversion, and the question was whether this sale constituted an assignment of the right to sue, and the court held that a right of action in trover is assignable. *Grant v. Ellis*, 26 Mich. 201, was a case holding that an action in trover for converting timber is assignable. *Finn v. Corbit*, 36 Mich. 318, was a case holding that a right of action for trespass to property is assignable. *Final v. Backus*, 18 Mich. 218, was a case in which the court holds that a right of action for conversion of logs is assignable. In *Brackett v. Griswold*, 103 N. Y. 425, the question involved was whether a cause of action growing out of a false annual report by a trustee, affecting a creditor, and giving him an action under the statute, died with the creditor, and it was held that it did. This question was joined with a charge of conspiracy to cheat and defraud, and it was held that this affected a property right, and survived. *Stewart v. Houston and Texas Central Railway Co.*, 62 Tex. 246, was a case in which it was held that an unliquidated claim for personal injury can not be assigned by the party injured, in Texas. The court approves *Railroad Co. v. Freeman*, 57 Texas, 156, and holds that as there was no survival there could be no assignment of the action for personal injuries. In the *Freeman case*, *supra*, the question involved was, whether a claim against a railroad company for killing and injuring live-stock could be assigned in equity, so as to enable the assignee to bring suit in his own name, and the court held that personal torts are not assignable, but that claims growing out of and adhering to property may be assigned. In *Choteau v. Boughton*, 100 Mo. 406, the question involved was, whether a right of action for a trespass to realty was assignable, and the court held that it was, and followed the case of *Schneider v. Wabash, St. Louis and Pacific Railroad Co.*, 86 Mo. 613. This latter case was an action brought against a railroad company for killing a hog which had strayed through a defective fence, and it was held that such a right of action might be assigned, as it would survive the death of the owner under the code.

All these cases—and many others might be cited—sustain the principle that causes of action for injuries to property, real or personal, by which an estate is diminished, are generally assignable. On grounds of public policy the sale or assignment of actions for injuries to the person are void. The law will not consider the injuries of a citizen,

whereby he is injured in his person to be, as a cause of action, a commodity of sale. On other grounds assignability is not legal.

In the discussion of the question of assignability of causes of action for torts, courts have usually based their decisions on the theory that where a cause of action survived it was assignable. Is that the sole test? Bispham, in his *Principles of Equity*, pp. 218, 219, states: "So, too, equity will not recognize assignments of certain species of property which it would be against the policy of the law to allow the owners to part with. These are, pensions given as rewards for extraordinary services, pay or half pay in the army, the salaries of judges, and other revenues and emoluments of a kindred character, which reasons of state require should remain always for the benefit of the person to whom they were originally given. . . . Yet in all these cases any balance unpaid at the time of death would survive to the personal representative. But the right of assignment is precluded on the principles of public policy."

Pomeroy, in his work on *Equity Jurisprudence*, sec. 1275, says: "It becomes important, then, in fixing the scope of the equity jurisdiction, to determine what things in action may thus be legally assigned. The following criterion is universally adopted: All things in action which survive and pass to the personal representatives of a decedent creditor as assets, or continue as liabilities against the representatives of a decedent debtor, are, in general, thus assignable; all which do not thus survive, but which die with the person of the creditor or of the debtor are not assignable. The first of these classes, according to the doctrine prevailing throughout the United States, includes all claims arising from contract, expressed or implied, with certain well defined exceptions, and those arising from torts to real or personal property, and from frauds, deceits and other wrongs, whereby an estate real or personal, is injured, diminished or damaged. The second class embraces all torts to the person or character where the injury and damage are confined to the body and the feelings, and also those contracts, often implied, the breach of which produces only direct injury and damage, bodily or mental, to the person, such as promises to marry, injuries done by the want of skill of a medical practitioner contrary to his implied undertaking, and the like, and also those contracts, so long as they are executory, which stipulate solely for the special personal services, skill, or knowledge of a contracting party."

Here is a distinction clearly drawn between injuries to property and injuries to the person. This distinction rests on a sound principle. If a person receives injuries to his person through the negligence of another, by our statute, sec. 123, chap. 3, the action therefor survives. By chapter 70, where death results from such injuries caused by such negligence of another the action still survives, but is brought for the exclusive use of the widow and next of kin. The administrator can not recover damages for the estate and at the same time recover for the

exclusive benefit of the widow. Statutes like chapter 70 are in force in most of the states. May a person injured assign the cause of action immediately after his injury, and thus, in case of his death from that injury, legally bar a recovery by the administrator for the exclusive benefit of the widow and next of kin? The purpose of chapter 70 is to benefit the widow and the next of kin. If an assignment on the basis of the survival of the action were the sole test, then in the case mentioned the assignment would be valid. But the very purpose of the survival, as created by the statute, is for the benefit of the widow and next of kin, which purpose the law will not permit to be defeated. Whether the action be for assault and battery or for injuries caused by the negligence of another, still the same rule obtains, and the action is included in the term actions for injuries to the person. The possible result of the assignment of such an action would be that the purpose of the law might be defeated. Courts have with but one exception steadily held that an action for injuries to the body is not assignable. These actions did not survive at common law, and statutes providing for such survival have had their birth since the passage of Lord Campbell's act, in 1852, which, by chapter 70 of our Revised Statutes, is substantially adopted. If such actions are held assignable on the sole ground of survival, then an assignee in bankruptcy or for the benefit of creditors would take the cause of action.

This principle that actions for personal injuries are not assignable is well sustained by authority. In *Rice v. Stone*, 1 Allen, 568, it was held that an assignment of a claim for personal injuries is void, although made after verdict but before judgment in an action to recover damages for such injury. The court say: "Such claims were not assignable at common law. On the contrary, a possibility, right of entry, thing of action, cause of suit or title for condition broken, could not be granted or assigned over at common law. But this ancient doctrine has been greatly relaxed. Commercial paper was first made assignable to meet the necessities of commerce and trade. Courts of equity also interfered to protect assignments of various choses in action, and after a while courts of law recognized the validity of such assignments, and protected them by allowing the assignee to use the name of the assignor for enforcing the claim assigned, and at the present day claims for property and for torts done to property are generally to be regarded as assignable, especially in bankruptcy and insolvency. There may be exceptions to this doctrine, but they need not be discussed here. But in respect to all claims for personal injuries, the question put by Lord Abinger in *Howard v. Crowther*, 8 M. & W. 603, are applicable. 'Has it ever been contended that the assignees of a bankrupt can recover for his wife's adultery, or for an assault? How can they represent his aggravated feelings?' And we may add the broader inquiry, has any court of law or equity ever sanctioned a claim by an assignee to compensation for wounded feelings, injured reputation or bodily pain suf-

ferred by an assignor? There were two principal reasons assigned why the assignments above mentioned were held to be invalid at common law. One was to avoid maintenance. In early times maintenance was regarded as an evil, principally because it would enable the rich and powerful to oppress the poor. This reason has in modern times lost much, but not the whole, of its force. It would still be in the power of litigious persons, whether rich or poor, to harass and annoy others if they were allowed to purchase claims for pain and sufferings and prosecute them in courts as assignees, and as there are no counter-balancing reasons in favor of such purchases, growing out of the convenience of business, there is no good ground for a change of the law in respect to such claims. The other reason is a principle of law applicable to all assignments, that they are void unless the assignor has either actually or potentially the thing which he attempts to assign. A man can not grant or charge that which he has not. . . . Most of the cases in which the right to assign this class of claims has been discussed have been assignments under the statutes of bankruptcy or insolvency. Much of the discussion has therefore related to the construction of these statutes, but the nature of the claims has also been regarded as an objection to their being assignable. In some cases the question has been discussed without reference to such statutes. In *Prosser v. Edmunds*, 1 Younge & Coll. 481, it was said that a bare right to file a bill in equity for fraud was not assignable. Lord Chief Baron Lyndhurst remarked that courts of equity had relaxed the ancient rule as to the assignment of choses in action, 'but only in the case where something more than a mere right to litigate has been assigned.' This constitutes a very important limitation." This case was followed in *Linton v. Hurley*, 104 Mass. 353.

In *Coughlin v. New York Central and Hudson River Railroad Co.*, 71 N. Y. 446, one having a claim against a railroad company for personal injuries accepted an offer from certain attorneys to take the claim for collection and divide the recovery. Afterward the railroad company, with notice of the attorney's interest in the cause of action, settled with the claimant and secured a release. In holding that the release was a bar to the action for negligence, and that the attorneys could not demand that the action proceed so that they might have the benefit of their agreement, the court say: "So if the cause of action before judgment be in its nature assignable, the owner of it may assign, and, by agreement, create legal and equitable interests therein, and such agreements may now be made with his attorneys as well as with other persons, and when such interests have been created, and notice given of them, they must be respected. But . . . when the cause of action is, like this, such as by its nature is not assignable, the party owning it can not, by any agreement, give his attorney or other person any interest therein,"—citing *People v. Tioga Common Pleas*, 19 Wend.

73, and *Pulver v. Harris*, 62 Barb. 500. To the same effect is *Chicago and Alton Railroad Co. v. Maher*, 91 Ill. 312.

The only exception to this rule is the case of *Vimont v. Chicago and Northwestern Railway Co.*, 69 Iowa, 296, which has been followed by other cases in that state. We do not think the reasoning on which these decisions are based is sound, and we decline to follow them.

The second proposition to be determined is, is a contract by which the person in whose name the action is brought and to whom it belongs, restricted from compromising or settling such a claim because of a contract to that effect? In other words, is such a contract valid and binding? The law does not discourage settlements in cases for personal injuries. Whether a cause of action exists, and if so, its nature and amount, are facts always involved in uncertainty, and a defendant has a right to buy his peace. The plaintiff has a right to compromise, and avoid the anxiety resulting from a cause pending to which he is a party. Any contract whereby a client is prevented from settling or discontinuing his suit is void, as such agreement would foster and encourage litigation.¹

We will not extend this opinion by a discussion of other questions raised. The decree of the Superior Court of Cook county and the judgment of the Appellate Court for the First District are each reversed and the cause is remanded, with directions to dismiss the bill.²

*Reversed and remanded.*³

¹ *Citing*, *Lewis v. Lewis*, 15 Ohio, 715; *Elwood v. Wilson*, 21 Iowa, 523; *Foster v. Jacks*, 4 Wall. 334; *Greenhood on Public Policy*, 474; *Boardman v. Thompson*, 25 Iowa, 487; *Huber v. Johnson* [68 Minn. 74], 70 N. W. Rep. 805.

² In a dissenting opinion Mr. JUSTICE CRAIG took the position that, "the rule seems to be quite well established by the authorities, leaving out of view questions of public policy, that all causes of action which, under the law, survive, are assignable. The test, therefore, by which to determine whether things in action are assignable, seems to be to ascertain whether the claim or demand survives upon the death of the party or dies with him. . . .

"It may be conceded that there are cases, as *Rice v. Stone*, and *People v. Tioga Common Pleas*, *supra*, which hold that a cause of action for personal injuries is not assignable, but I regard the decided weight of authority the other way. If the cause of action in the case under consideration was merely personal,—one which would not survive the party injured, but would die with him,—I would have no hesitation in holding, as was done in *Rice v. Stone* and *People v. Tioga Common Pleas*, *supra*, that the cause of action could not be assigned to a third party. But such is not the case. Under our statute, as has been seen, an action to recover damages for personal injuries survives, and being possessed of that important element no reason is perceived why an action of that character may not be assigned in the same way and with like effect as an action of debt composed of various items, or as an action to recover damages for breach of contract." Mr. JUSTICE MAGRUDER concurred in these views.

³ See also, *Chicago Gen. Ry. Co. v. Capek* (1899), 82 Ill. App. 168. Action for personal injury brought in name of assignor for the use of the assignee. *Held*, that the principle of *North Chicago Street Railway Co. v. Ackley*, was not thereby affected. "This suit can not be maintained for the use of, when it can not be maintained in the name of, an assignee of the claim in question."—*Per* HORTON, J.

II. NATURE OF THE OBJECTION THAT ONE SUING ON AN ASSIGNED
CHOSE IN ACTION IS NOT THE REAL PARTY IN INTEREST.

LYTLE *v.* LYTLE.

COURT OF APPEALS OF KENTUCKY, SUMMER TERM, 1859.

[2 *Metc.* 127.]

JUDGE DUVALL delivered the opinion of the court: The plaintiff states in her petition that the defendant is indebted to her in the sum of \$160, being the price of a land warrant which belonged to the plaintiff, and which the defendant had sold for her at that price; that the plaintiff was indebted to James Harmon, and had assigned to him by a written assignment, which is exhibited with the petition, the debt due from the defendant; and she therefore sues for the use of said Harmon.

The defendant answered, admitting that he sold the warrant for the plaintiff at the price stated, but alleging that after the assignment in favor of Harmon had been executed and presented to him, he saw the plaintiff, who told defendant not to pay the amount to Harmon, as she was mistaken as to the amount for which the assignment was drawn. To this answer the plaintiff demurred; the demurrer was overruled, and judgment rendered for the defendant in bar of the action. From that judgment the plaintiff has appealed, insisting that the defence set up in the answer is insufficient.

We deem it unnecessary to consider the question arising on the demurrer, inasmuch as, upon the whole record, the judgment is obviously right, and must therefore be affirmed.

By the Civil Code, (sec. 30,) "every action must be prosecuted in the name of the real party in interest, except as provided in section 33." By the latter section executors, administrators, guardians, trustees of an express trust, persons with whom contracts may be made for the benefit of another, or persons expressly authorized by statute to do so, may bring an action without joining the person for whose benefit it is prosecuted.

Upon the face of the petition in this case it is perfectly clear that the plaintiff was not the owner of the debt for the recovery of which the action is brought; but that Harmon is the equitable owner of it, and he is therefore the real party in interest; and under the plain rule of practice referred to, the action should have been prosecuted in his name as plaintiff. It is true that, according to section 31, the assignor, Mrs. Lytle, was a necessary party, as plaintiff or defendant, as the assignment was not authorized by statute, and did not invest the assignee with the legal title to the debt assigned.¹ In the caption, as well as in

¹ Cf. provision from Kentucky Code, *ante*, p. 190.

the body of the petition, the name of Harmon is mentioned as the person for whose use the action is brought ; but he did not thereby become, either substantially or formally, a party to the action. Under the law, as it stood prior to the adoption of the Code, a different rule of practice prevailed, because no one but the legal owner of a chose in action could prosecute an action at law for its recovery ; and in case where another person was the equitable owner of the demand, the suit was usually and properly brought for the use of such equitable owner. This rule exists no longer, and the requirements of the Code, by which it has been superseded, are imperative, and must be pursued. *Wilkes v. Morehead*, MS. opinion, 1856.

It follows that as the petition itself disclosed the fact that the plaintiff was not entitled to the debt sued for, but that the right of action was in another, no valid judgment could have been rendered against the defendant ; and upon that ground alone the judgment in his favor must be affirmed.

L. M. Cox, for appellant.

L. W. Andrews, for appellee.

VAN DOREN, RESPONDENT, *v.* RELFE, APPELLANT.

SUPREME COURT OF MISSOURI, MARCH TERM, 1855.

[20 Mo. 455.]

This was an action brought in January, 1852, to recover damages for the breach of a covenant of seizin contained in a deed from Relfe to Van Doren for certain land, dated August 13, 1836.

The land was within what is known as the Iron Mountain tract, confirmed to Joseph Pratte by act of congress of July 4, 1836, and Relfe had no title at the time of his conveyance to Van Doren. On the 8th of May, 1838, Van Doren conveyed all his property of every description, including the land acquired of Relfe, and all his rights of action, to trustees for the benefit of creditors. In this conveyance, the trustees were by Van Doren appointed his "true and lawful attorneys irrevocable, *in his name or otherwise*, to ask, demand, and recover and receive of and from all and every person or persons all goods, chattels, debts and demands, due, owing or belonging unto him, and in default of delivery or payment, to sue for the same."

In 1842, Van Doren, after regular proceedings in the United States District Court in Ohio, received his discharge under the law of the United States for the relief of bankrupts, by virtue of which, all his property and rights of action were vested in assignees in bankruptcy.

The Circuit Court held that the beneficial interest in the claim for damages was in the trustees, unaffected by the subsequent proceedings

in bankruptcy, and that by the terms of the deed to them, they could maintain a suit in the name of Van Doren. The defendant appealed.

J. W. Noell, for appellant.

M. Frissell, for respondent.¹

SCOTT, J.—The point relied upon by the defendant is, that this suit can not be maintained in the name of Van Doren. There being no seizin in James H. Relfe, of the land conveyed by him to Van Doren, the covenant of seizin contained in Relfe's deed was broken immediately, and a right of action accrued thereon to Van Doren so soon as it was executed. So there was in Van Doren a right of action for unliquidated damages arising from a breach of contract. Van Doren afterwards assigned this right of action to trustees for the benefit of his creditors. The requirement of the present practice act is, that every civil action must be prosecuted in the name of the real party in interest, with some exceptions. Among these is that of a suit by the trustees of an express trust. Now but for this exception, this suit must have been brought in the name of the creditors. There was no interest in Van Doren which would have warranted a suit in his name. This is not like those cases in which a note is expressly made payable to a person who holds that note for the benefit of others, as in the case of *Harney v. Dutcher* [1851], 15 Mo. 89, in which it was held that the payee of the note was the trustee of an express trust. Here Van Doren is the mere owner of unliquidated damages which he has assigned away. He then is in the situation of the holder of an open account, who, after he assigns it away, can not maintain an action upon it in his own name.²

If the right of action was not transferred to Van Doren's trustees, then it continued in him until his bankruptcy, when it passed to his assignee. So, in whatever light the matter may be viewed, Van Doren has no right to institute suit in his own name.

With the concurrence of the other judges, the judgment will be reversed.

WILSON AND ANOTHER *v.* CLARK.

SUPREME COURT OF INDIANA, NOVEMBER TERM, 1858.

[11 *Ind.* 385.]

Appeal from the Lagrange Court of Common Pleas.

PERKINS, J.—Suit by the payee against the makers of promissory notes. Answer by the defendants:

"That before the commencement of this suit, said Clark, the payee of the notes and plaintiff in the suit, sold and delivered said notes to Thomas J. Spalding.

¹ The arguments are omitted.

² *Citing*, *Mauro v. Walker*, 18 Mo. Rep. 564. See also, *Allen v. Kennedy* (1886), 91 Mo. 324. 330.

and received from said Spalding the price and consideration of said sale and delivery; that from the time of the delivery by said Clark to Spalding, up to the present, they have been wholly the property of Spalding, and in his possession; that said Spalding is the only person who has any real interest in or title to said notes, or their proceeds; that said Clark, by said sale and delivery, assigned said notes to said Spalding without indorsement; that said Clark is not the owner of said notes, or either of them, nor has he any interest whatever in or to them, nor has he now, or at any other time since said sale, had either of said notes in his possession, nor did said Clark direct or authorize this action to be commenced in his name, but it was commenced by the direction of said Spalding alone."

Demurrer to this answer sustained. Judgment for the plaintiff for the amount of the notes.

The answer was a good bar to the action, and the demurrer to it should have been overruled. By our statute, suit must be brought in the name of the real party in interest.¹

Another point is made in the case. The notes sued on were executed in the State of Michigan, and the complaint contains the following clause:

"By the law of Michigan, in force at the date of the notes, and from thence hitherto, the said Clark, or his indorsee, can alone maintain the action."

It is uncertain from this language, whether a statute is relied on or not; but it may be so regarded, as the doubt must operate against the pleader.

It is insisted upon this averment that the suit, as to parties, is rightly brought, and that the law of this state as to parties can not control it.

Waiving the question, for the present, whether if the Michigan law were really brought before the Court, it could have the effect claimed for it, it is enough for the purposes of this case to say that the law of that state has not been put into the case. The clause quoted from the complaint amounts to nothing. It is a mere assumption, by the pleader, of a legal proposition, without an averment of any facts for the proposition to rest upon. Pleadings should state facts, not legal propositions. Under our system of pleading, if a written instrument or record, or other matter of fact, be relied on as the foundation of an action, it must be placed plainly, fully, and with certainty, upon the record. If the law of another state be relied on, that law must be fully recited in the pleading, that the Court may judge of its effect, and be able to give a construction to it. *Sedgw. on Stat.*, p. 34. Archbold says, in his Pleading (pp. 146, 147), that if a statute be pleaded, it must be specially "recited in the pleading; otherwise the Court can not take notice of anything contained in it." This is the language of all the books and adjudicated cases. 14 *Petersd. Abr.* p. 172; 1 *Bl. Comm.* 85; note; *The Ohio Co. v. Ridge*, 5 Blackf. 78; *State v. The Trustees*, 5 Ind. 91.

¹ *Citing*, *Lamson v. Falls*, 6 Ind. 309; *Harvey v. Myer*, 9 Ind. 391; *Ferry v. Jones*, 10 Ind. 226; *Swift v. Ellsworth*, 10 Ind. 205.

The case of *Breckenridge v. Baxton*, 5 Ind. 501, can scarcely be supported.

Our statute (2 R. S., p. 45) has changed the rule so far as it relates to private statutes of this state. They may be pleaded by reference to title and day of approval, because such pleading enables the Court, without inconvenience, to examine the act in the printed statute-book. But no change is made as to pleading laws of another state. These, the Court may not be able to examine in the books. They may have to depend upon the copy recited in the pleading.

As to the point which we passed by, touching the right of the legislature to alter the law as to parties, it is one not necessary, it will be perceived, to be here decided. The point has, however, been determined in *Hancock v. Ritchie*, at this term [11 Ind. 48], in which it is held that the statute authorizing the equitable assignee to sue in his own name, relates to the remedy alone, and applies to then existing contracts.¹

Per CURIAM.—*The judgment is reversed with costs.*

Cause remanded, &c.

A. Ellison, for the appellants.

J. B. Howe, for the appellee.

ROBBINS *v.* DEVERILL.

SUPREME COURT OF WISCONSIN, JUNE TERM, 1865.

[20 Wis. 142.]

Appeal from the Circuit Court for Winnebago County.

The complaint alleges that, on etc., the defendant bought of Peet & Williams, at Menasha in this state, one hundred barrels of flour, marked, etc., for which the defendant then and there, in consideration of such sale, promised to pay them \$4.80 per barrel, on delivery of the same; that the same was to be delivered by the said Peet & Williams by shipment thereof by water from Menasha to Green Bay for defendant; that said flour was delivered, on etc., by such shipment; that defendant has been often requested but has refused to pay for said flour; that on etc., said Peet & Williams, for a valuable consideration, duly assigned to the plaintiff the indebtedness of the defendant to them for said flour, of which defendant had due notice before the commencement of this action; and that there is now due the plaintiff from defendant for said flour \$480.00, with interest, etc. The defendant answered denying, on information and belief, that the indebtedness mentioned in the complaint was at any time assigned by said Peet & Williams to the plaintiff, and alleging that said indebtedness was, at the commencement of the action, and con-

¹ Part of the opinion is omitted.

tinued to be, the property of said Peet & Williams; that plaintiff was not the party in interest in the action, but that said Peet & Williams were the real parties in interest. The answer then set up a counterclaim. There was a reply in denial of such counterclaim.

On the trial, the defendant objected to the introduction of any evidence under the complaint, on the ground that it did not state a cause of action. Objection overruled. The plaintiff proved the execution of a written assignment to him by Peet & Williams, of their claim. . . . Plaintiff, as a witness in his own behalf, testified that the consideration of the assignment to him was a balance of a grain account due him, exceeding the amount of his claim against the defendant. On cross-examination he said: "Peet & Williams owed me for grain sent them from Fon du Lac. I was then in business at Fon du Lac. At the time of the arrangement [assignment] I had two partners. I was buying wheat on joint account with R. M. Lewis and also my brother. . . . Think this wheat to Peet & Williams was sold on account of Robbins & Lewis. My brother and myself have a half interest in the business of that firm. I have not credited anything to Peet & Williams on our company books on account of this claim. I was not to credit the amount to them until collected." The account assigned to plaintiff was in the following form:

" 1863.	H. DEVERILL.	Dr.
Nov.	To 100 bbls. flour marked Eclectic Mills XXX., and shipped to your order, Green Bay.....	\$480.00
	To interest on \$480.00, 30 days	3.00
		<u>\$483.00</u>

The assignment was as follows:

"For full value paid us in hand, we hereby bargain, sell and assign the foregoing account to A. Robbins, guaranteeing \$483 due on the same. Neenah, Dec. 2, 1863. . . . (Signed) PEET & WILLIAMS."

The defendant moved for a non-suit on the grounds, 1. That plaintiff had not shown any interest in the demand sued, except in connection with his co-partners. 2. That the evidence did not sustain the complaint. 3. That the assignment was void because it had not been stamped as required by law. Motion denied. . . . The court instructed the jury that "the answer admitted the delivery of the flour, and its acceptance by the defendant; that an existing indebtedness of the assignor of a thing in action, in which the plaintiff is interested as an entire or part owner of the same, is a sufficient consideration for the assignment of the account; and that there need be no consideration for the assignment to enable the plaintiff to maintain an action as assignee of an account, unless such assignment in some way interferes with some defence to the action upon such account in the name of such assignee."

Verdict and judgment for the plaintiff; and the defendant appealed.¹

C. Coolbaugh, for appellant.

Moses Hooper, for respondent.²

DIXON, C. J. . . .³

The only remaining question is as to the plaintiff's interest in the cause of action proved, and his right to sue in his own name alone. The statute is imperative, that every action must be prosecuted in the name of the real party in interest except as therein otherwise provided. R. S. ch. 122, sec. 12. The only exception claimed to be applicable here, is that found in section 14, that a trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted. The proof is, that the plaintiff is not sole owner of the demand sued upon. It belongs to the firm of Robbins & Lewis, composed of the plaintiff, his brother, and one Lewis. The plaintiff and his brother have one-half interest, and Lewis the other. The demand was transferred to the plaintiff alone by words of absolute assignment, no trust being expressed; but, as the plaintiff testifies, he holds it nevertheless in trust for the firm. It was received on account of a debt due the firm from Peet & Williams, the assignors. Upon these facts it seems to me the plaintiff can not maintain the action. He is not the real party in interest, nor the trustee of an express trust, within the meaning of the statute. His brother and Lewis should have been joined as co-plaintiffs. He is not the trustee of an express trust, because no such trust appears from the assignment, and none is shown to exist between himself and his co-partners by virtue of any other instrument. In order to constitute a trustee of an express trust, as I understand the statute, there must be some express agreement to that effect, or something which in law is equivalent to such an agreement. The case of factors and mercantile agents may or may not constitute an exception, under the custom and usage of merchants. *Grinnell v. Schmidt*, 2 Sandf. (S. C.), 706. But in every other case, the trust must, I think, be expressed by some agreement of the parties, not necessarily, perhaps, in writing, but either written or verbal according to the nature of the transaction. In this case no agreement is shown that the plaintiff was to take or hold as trustee, and that he is a trustee results merely from other circumstances. It is implied from the facts of partnership and that the plaintiff received the assignment on account of a debt due the firm. If it is not purely a case of implied trust, as distinguished from an express trust, then I am at a loss to conceive of one; and to hold the plaintiff to be a trustee of an express trust, would, in my judgment, be a palpable disregard of the statute and violation of the intention of the legislature. I think, therefore, that the court should have granted the defendant's motion for a nonsuit, and have given the

¹ Several passages in the statement of the case are omitted.

² The arguments are omitted.

³ Part of the opinion, on other points, is omitted.

instruction asked upon this point, unless the objection was waived by the omission of the defendant to take it by answer.

That it was so waived was very clear, and the only difficulty I have had about the question has arisen from the manner in which the evidence was or might have been given. If the evidence of the interest of the co-partners of the plaintiff was, or could be assumed to have been, given without objection on the part of the plaintiff, then I seriously question whether the defendant ought not to have the same benefit from it as if the objection of a want of proper parties had been taken by answer. *Lewando v. Dunham*, 1 Hilt. 114, seems to be a decision to this effect; and I question whether it would not be so in analogy to the rule held in New York, that where the complaint does not state facts sufficient to constitute a cause of action, and the defendant neither demurs nor takes objection at the trial, he can not afterwards do so on appeal.¹ If the evidence of the plaintiff's want of interest had been received without objection, and no motion to expunge had been made or instruction asked by him, and the defendant had prevailed, and the plaintiff appealed on the ground that the defence was not set up in the answer, it would seem that he would have been concluded by his silence at the trial, and the objection could not have been taken for the first time in this court. But such is not the case here. The defendant, notwithstanding the admission of evidence, was unsuccessful. His motion for a nonsuit was denied, the instruction refused, and he appeals for that reason. The question then is, whether it can be assumed that the evidence was received without objection on the part of the plaintiff. I think it can not. On the contrary I think the presumption is that it was objected to. As already observed, the evidence was clearly inadmissible under the answer. The defect of parties plaintiff, not appearing by the complaint, must have been taken by answer; and not having been so taken, the objection was waived. R. S. ch. 125, secs. 5, 8, 9; *Cord v. Hirsch*, 17 Wis. 403; *Gundry v. Vivian*, id. 436; 2 Whit. Pr., § 171, and cases cited. Such waiver is absolute, subject only to the power of the court to order other parties to be brought in when necessary to a complete determination of the controversy, and to the right of the defendant to object at the trial in cases where the defect or misjoinder is not formal in its nature, but goes directly to the merits, as affecting the rights of the plaintiff to maintain the action. Whit. Pr., *ibidem*. Here there is no necessity for bringing in other parties. The legal title is vested in the plaintiff, and a recovery and satisfaction by him will discharge the defendant from all further liabilities. The defect is merely formal, and does not go to the merits. The cause of action proved corresponds entirely with that alleged in the complaint. The defendant could not, therefore, object

¹ Citing *Mosselman v. Caen*, 34 Barb. 66; S. C. 21 How. Pr. 248; *Pope v. Dinsmore*, 8 Abb. R. 429; *Carley v. Wilkins*, 6 Barb. 557; *Hunt v. Bloomer*, 13 N. Y. 341; *Johnson v. Whitlock*, id. 345; *Bowdoin v. Colman*, 6 Duer, 186.

on the ground of variance or defect of proof. Hence the defect of parties was absolutely waived, and the evidence wholly inadmissible under the pleadings, and being so, I think the presumption is that it was objected to. Or if this is not so, then I am confident that the contrary presumption can not be entertained, that the plaintiff did not object, which is necessary before the defendant can have the benefit of the facts proved, the same as if he had stated them in his answer. The bill of exceptions is the defendant's, not the plaintiff's, and if the plaintiff had objected his objections could not appear. *Knox v. Cleveland*, 13 Wis. 245. But if it can be assumed that he did not object at the time the testimony was offered, it seems to me that it can not upon the motion for nonsuit, and when the instruction was asked. The defendant moved for a nonsuit upon this distinct ground, among others, which motion was successfully resisted by the plaintiff. May it not fairly be presumed that the court denied the motion for the reason that the evidence had been improperly admitted, and should be disregarded? And may not the instruction have been refused for the same reason urged by the plaintiff or adopted by the court? It appears to me to be a fair presumption in either case. In *Durgan v. Ireland*, 14 N. Y. 322, it was held not to be error in the judge in his final ruling, which determined the verdict, to disregard evidence which had been improperly received, without any subsequent order to expunge it. See also, *Jackson v. Whedon*, 1 E. D. Smith, 141.

For these reasons I think the judgment of the circuit court must be affirmed.

DOWNER, J.—The majority of the court are of the opinion that the only way that the defect of parties plaintiff could have been taken advantage of was by demurrer or answer; and if not taken in that way the defect was waived. And it is immaterial whether the proof of the interest of other parties was objected to by the plaintiff at the time it was received or not. Our statute respecting appeals differs in this respect from that of New York. We agree with the Chief Justice in affirming the judgment, but not in all his reasoning. We express no opinion as to whether the plaintiff is the trustee of an express trust within the statute, or is the real party in interest, so as to sue in his own name.

By the Court.—The judgment is affirmed.¹

¹ "The defendant's counsel offered to prove that the plaintiff did not own the claim in suit. Objection was made that this was not set up in the answer and the court sustained the objection. This ruling was, we think, correct. The pleadings admitted that the bonds were received by the defendant from or on the order of the plaintiff, and the only dispute was as to the terms upon which they were delivered. In the absence of any averment of title in a third person, with which the defendant connected himself, or of a plea that the plaintiff was not the real party in interest, the evidence was clearly inadmissible."—*Per* RAPALLO, J., in *Smith v. Hall* (1876), 67 N. Y. 48, 50.

See also, *Giraldin v. Howard* (1890), 103 Mo. 40, 45: "No question was raised in the court below by demurrer, answer, on trial or in the motion for a review, that the suit was not being prosecuted in the name of the real party in interest, and the objection made for the first time in this court comes too late to avail anything."—*Per* BRACE, J.

HERETH AND ANOTHER v. SMITH.

SUPREME COURT OF INDIANA, NOVEMBER TERM, 1870.

[33 Ind. 514.]

Appeal from the Marion Civil Circuit Court.

J. E. McDonald, A. L. Roache, E. M. McDonald, J. M. Butler, P. W. Bartholomew, A. G. Porter, B. Harrison, W. P. Fishback, for appellants.

F. Rand and R. H. Hall, for appellee.

WORDEN, J.—This was an action by Mary Smith against the appellants upon a promissory note executed by the latter to one S. B. Hartman and by him indorsed to plaintiff. Issue, trial, verdict, and judgment for the plaintiff for the amount of the note and interest.

The record does not contain the evidence, or the instructions given, or those refused. There is no question before us properly, except that arising upon the fourth paragraph of the answer, to which a demurrer was sustained and exception taken. That paragraph is as follows:

"And for a further answer herein, the said defendants Hereth and Langsdale say that they admit the execution of the note in the said complaint mentioned, but they say that the plaintiff ought not to have and maintain said action against them, because they say that said plaintiff is not the real plaintiff [party] in interest; that she has no interest whatever in said note, and that said note belongs to one ———. Wherefore defendants pray judgment for costs," &c.

All pleadings in bar of an action resolve themselves into two classes, viz.: those in denial, and those by way of confession and avoidance. The above paragraph can hardly be held good as a denial of the cause of action, for the reason that it does not controvert or deny any allegation of the complaint. It expressly admits the making of the note, and does not deny the indorsement thereof to the plaintiff, as alleged in the complaint. Regarded as an answer by way of confession and avoidance, it must be taken to admit expressly or impliedly the making of the note and the indorsement thereof to the plaintiff, as alleged in the complaint; and admitting those facts, the inquiry arises, what new facts are alleged in avoidance of the legal effects of the facts thus admitted? It alleges that the plaintiff is not the real party in interest, &c.

The legal qualities of the answer will not be changed, but may be illustrated, by putting it in this wise: The defendants admit the making of the note, and that it was duly indorsed to the plaintiff by the payee thereof, as alleged in the complaint; but still they say she does not own it, but, on the contrary, it belongs to some one else, and she is not the real party in interest. But if the note was thus indorsed to the plaintiff, why does she not own it? why is she not the rea

party in interest? and how did it become the property of some one else? The pleading fails to answer any of these queries, or to state any facts from which the assumptions are drawn. No new facts whatever are stated that avoid the legal effect of the facts thus admitted. That such pleading is bad needs the citation of no authorities, but for convenience of reference we cite the following: *Garrison v. Clark*, 11 Ind. 369; *Elder v. Smith*, 16 Ind. 466; *Raymond v. Pritchard*, 24 Ind. 318; *Lewis v. Sheaman*, 28 Ind. 427.

The judgment below is affirmed, with two per cent. damages and costs.¹

BROWN v. CURTIS ET AL.

SUPREME COURT OF CALIFORNIA, MARCH 24, 1900.

[— Cal. —]²

The facts appear in the opinion.

From a judgment in favor of the plaintiff, Brown, the defendants appeal.

William P. Veuve, for appellants.

H. V. Morehouse, for respondent.

CHIPMAN, C.—Action for the value of certain nursery trees sold and delivered to plaintiff's assignors. Defendants answered by general

¹ See also, *Curtis v. Gooding* (1884), 99 Ind. 45, 52; *Pixley v. Van Nostern* (1884), 100 Ind. 34; *Cottle v. Cole* (1866), 20 Iowa, 481: "The judgment sued upon was rendered in favor of one Cluff. The present plaintiff distinctly alleged, in his petition, 'that, after the rendition of said judgment, the said Cluff sold and assigned said judgment to the plaintiff in writing, of which assignment the following is a true copy,' &c., setting out the assignment in *haec verba*. The District Court held that an answer simply 'denying that the judgment had been assigned by said Cluff to the plaintiff,' was not good pleading, and this holding was, under the allegations of the petition, correct. The code system requires facts and not legal conclusions, to be pleaded. The answer does not deny the fact of the execution of the written assignment, specifically alleged in the petition, nor does it set out any facts upon which the conclusion, that the judgment had not been assigned, is based. The denial should have been of the facts pleaded, as the petition on its face contained facts, which *prima facie* established the assignment."—*Per DILLON, J.*, p. 482.

See also, *White v. Drake* (1877), 3 Abb. N. C. 133; *Van Dyke v. Gardner* (1897), 21 Misc. 542: "Under the issues framed by the pleadings defendant could not show that the plaintiff was not the real party in interest, as he failed to allege the facts necessary to raise such an issue. The mere legal conclusion 'that plaintiff was not the real party in interest' pleaded by him, was not sufficient."—*Per CURIAM; FITZSIMONS, CONLAN, and SCHUCHMAN, JJ.*

Compare *Deuel v. Newlin* (1891), 131 Ind. 40, 41: "The second paragraph of the answer averred in substance that the note was, and at all times had been, the property of the payee; that the appellant [payee's transferee and plaintiff in the action] had no actual interest in it, and that it was transferred to him without consideration, for purposes of collection only, and to prevent the appellee pleading as a set-off against it certain indebtedness due to him from the payee. A demurrer to this paragraph of answer was overruled, and this ruling is assigned as error. The answer is clearly good."—*Per McBRIE, J.*, referring to *Hereth v. Smith*, and other Indiana cases. On the Indiana doctrine as to the effect of an assignment for purposes of collection, see *infra*.—*Ed.*

² S. C. 60 Pac. Rep. 773.

denial, and also set up specially, by separate answer, certain facts; alleging the failure of plaintiff's assignors to comply with the terms of the contract under which the trees were delivered. The pleadings were not verified. The trial was by a jury, and plaintiff had the verdict. Defendants appeal from the judgment, and from the order denying their motion for a new trial.

It is claimed by appellants that there was no evidence introduced to prove an assignment or transfer to plaintiff of the claims sued on. The complaint sets forth certain claims in two counts, one of which alleges the sale to defendants of certain fruit trees by one H. H. Linville, and an assignment to plaintiff of the claim; and the other count alleges a sale by one W. J. Linville to defendants, and an assignment to plaintiff. The assignment in each instance, and the denial thereof, raised a material issue, which it was incumbent on plaintiff to establish by proof.¹ Respondent contends that "the assignment is not the cause of action, but only the right of plaintiff to sue," and quoting from *Navigation Co. v. Wright*, 8 Cal. 585, claims that "the want of legal capacity to sue is a personal disability, and, if the defendant intends to set up such a defence, he should state so distinctly. The general denial relates to some other facts alleged concerning the contract. The general issue is not sufficient,"—citing, also, *White v. Moses*, 11 Cal. 70; *Bank of Shasta v. Boyd*, 99 Cal. 604, 34 Pac. 337; and some other cases. Respondent fails to distinguish between the question of capacity and the question of right to sue. The capacity is one thing, while the right is quite another. The capacity may be admitted, but the right must rest upon proof of assignment, and must be established, whatever may be the capacity in which the assignee sues.

Respondent calls attention to the testimony which he claims sufficiently proved the assignment. It appears that when Curtis, one of defendants, was testifying as a witness in relation to certain correspondence he had with one of the Linvilles as to the unsatisfactory condition of the trees, and to arrange a meeting, after stating that the meeting was put off, he said, "After that, the next letter I got from Linville, he stated that he assigned his claim to Brown." It was admitted that plaintiff made demand upon the defendants prior to the commencement of the action. In defendants' special defence, the answer begins as follows: "(1.) That during the years 1893 and 1894, H. H. Linville, the assignor of plaintiff, was a nurseryman," etc. This is all that is pointed out by respondent from which the jury found that the claims of both the Linvilles were assigned to plaintiff. If we could regard the admission that one of the Linvilles wrote to Curtis that he had assigned his claim to Brown as evidence of the fact, it would still leave no admission as to the other claim. But we can not regard it as evidence of the fact at all. There is nothing to show that the defendants, or either of them,

¹ *Citing*, *Read v. Buffum*, 79 Cal. 77, 21 Pac. 555; *Ford v. Bushard*, 116 Cal. 273, 48 Pac. 119.

at any time dealt with or recognized Brown as assignee. Nor was a mere admission that Brown demanded payment before suit brought any evidence of Brown's ownership of the claims, or right to sue upon them. The statement in the separate answer of defendants above quoted was not an admission, and, if it was, it was not inconsistent with the denial of the fact contained in the earlier part of the answer. At most, it could only be regarded as describing the person of Linville. It does not purport to admit the assignment, and can not reasonably be given that effect. Respondent is correct in stating that the reason for requiring proof of the assignment is to protect the defendant from any claim of the assignor; but it is not true, as claimed, that "when the assignor takes the stand for the plaintiff and . . . the defendant admits a demand from the assignee, and notice from the assignor that he has assigned the claim to plaintiff, certainly the proof is sufficient to show any assignment." Brown may not have had any assignment when he made the demand. Linville may not have in fact assigned his claim when he wrote he had done so. It was incumbent upon Brown to establish his right to sue, and this necessitated proof of the assignment by which alone he had any such right. It was as necessary for Brown to prove this fact as it was to prove the indebtedness. The fundamental error of respondent was in assuming what he now urges in his brief,—that "the question of assignment only goes to the capacity to sue, and not to the cause of action; and, therefore, if defendants wish to raise the question of assignment, they must do so by a special defence, and can not do so by a general denial."

The view we have taken makes it unnecessary to notice appellant's contention that the evidence may not be the same at the second trial. It is advised that the judgment and order be reversed, and the cause remanded.¹

¹ Compare *Davis v. Pres. of D. & H. Canal Co.* (1888), 109 N. Y. 47, 51: "The pleadings put the plaintiff's title in issue. . . . *Smith v. Hall*, 67 N. Y. 48, is not applicable. In that case the defendant, by answer, admitted that the property in question was received by the defendant from the plaintiff and the only dispute was as to the terms on which it was received. Here the contention goes further, admitting no right in the plaintiff, the defendant denies his title."—*Per* DANFORTH, J.

III. THE REAL PARTY IN INTEREST WHEN THE ASSIGNMENT OF THE
CHOSE IN ACTION IS ABSOLUTE.

1. *Assignment before action brought.*

NOTE.—If the assignment of a chose in action is not only absolute but complete in the sense that the assignee would have had a full legal title under the rules of common law pleading, the cases make no question as to his right to sue in his own name under the codes. But there are many assignments which while free from substantive limitations are not complete in this procedural sense. In such cases, the older rules and distinctions have often sought a place in code pleading. The decisions which immediately follow have to do with these, and with some other, distinctions which, in absolute assignments, have been supposed to affect the rule of the codes requiring a civil action to be brought in the name of the real party in interest.

WOOLISCROFT v. NORTON AND ANOTHER.

SUPREME COURT OF WISCONSIN, JANUARY TERM, 1862.

[15 Wis. 198.]

Appeal from the Circuit Court of Rock County.

Action to recover for work done and material furnished by the plaintiff in repairing a dam and raceway. The facts, as reported, by a referee, were substantially as follows:

A. Hyatt Smith and N. O. Walker were owners of land in Rock County, and of a dam erected thereon across Rock River, and of the power thus created; Smith owning three-fourths and Walker, one-fourth, undivided. While they were such owners, in 1849, Smith executed to Stevens & Older a deed of a portion of said land for a mill site, and for 550 square inches of water to be used thereon—this being the first conveyance of any part of said water power by the proprietors or either of them. This deed contained a covenant by the grantees that they would pay their ratable share of the expenses of keeping in repair the dam and raceway, "in proportion to the number of square inches of water by them owned or used;" and that on a failure by them to make such payments, the grantor should have the right to enter upon said lot, and to shut off therefrom all said water, until such payments should be made; and for that purpose, but no other, all water-gates through which such water might pass, were declared to be the property of the grantors, their heirs, etc. Subsequently Older quit-claimed his interest in said grant to Stevens, who afterwards, in December, 1850, received a deed from Smith & Walker of additional land and 500 square inches more of water. This deed contained a covenant by Stevens similar to that above described. By mesne conveyances, each containing similar covenants on the part of the grantees, the defendants Norton and Ford became equal owners in common of the land and the right to said 1050 square inches of water, and were such owners when the repairs mentioned in the complaint were made.

In 1857, Smith & Walker employed the plaintiff to make certain repairs mentioned in the complaint; and he did work and furnish materials to the value of \$1,630.62, and this amount was proportioned among the several owners, lessees, and users of the water in accordance with the rule above stated—the sum of \$221.69 being apportioned to the defendants.

The referee also found that neither at the time when the work was done and the materials furnished by the plaintiff, nor afterwards, had any formal assignment or transfer of the assessments been made to the plaintiff by the owners of said dam and water power, but the same were handed over to him by A. Hyatt Smith with directions to collect them and apply the money to the payment of said claim for repairs. The referee found also that Norton & Ford had a valid counterclaim against the plaintiff for \$36.34.

The circuit judge held, upon these facts, that the covenant for repairs by the grantees of Smith & Walker ran with the land, and was binding upon the defendants; and that there was an implied promise on the part of the defendants to pay the plaintiff their portion of the expense of repairs made by him, when ascertained according to the rule provided in the deed.¹

H. K. Whiton, for appellant.

Knowlton, Prichard & Jackson, for respondents.²

By the Court, COLE, J.—It appears to us that this suit was properly brought in the name of the plaintiff. He was employed to do the work and make the repairs on behalf of the proprietors of the water power; and although there was no formal assignment of the account against the defendants for repairs, still it was in fact given to him with directions to collect and apply the money to the payment of his claim, so that really he is the party in interest. So that the case may be considered as resting substantially on the same grounds and controlled by the same principles of law, as though the proprietors had done the work, and made the assessment for repairs, and brought their suit for a ratable compensation. If the action could be sustained in the latter case, we can not see why it can not now.³

¹ The reporter's statement of facts has been abridged.

² Counsel for the respondents made the following point among others: "The conclusion that handing to the plaintiff the account for the expenses apportioned to the defendants, operated as an assignment of the claim is not, if correct, sufficient to enable the plaintiff to maintain the action. To recover, the action should be predicated upon the covenant, and allege the refusal to pay as a breach; but to maintain such an action, the plaintiff must show that the covenantees had assigned the covenant to him."

³ Part of the opinion, dealing with other points, is omitted. The judgment below was reversed on other grounds, and the cause remanded for further proceedings in accordance with this opinion.

LONG v. HEINRICH.

SUPREME COURT OF MISSOURI, OCTOBER TERM, 1870.

[46 Mo. 603.]

Error to Second District Court.

Conger & Reynolds, for plaintiff in error, defendant below.¹*Perryman & Dinning*, *Van Allen & Wing*, and *Relfe*, for defendant in error, plaintiff below.²

BLISS, J.—James Long & Co. advanced \$300 for defendant upon his written request, and the plaintiff, as assignee of James Long & Co., brings his suit to recover a balance due upon said advance.

No defence upon the merits was made to the claim, the defendant only insisting that it was not assignable, and that the plaintiff could not sue in his own name. For this view he relies upon the fact that, in the revision of 1865, chapter 21, entitled "Bonds, notes, and accounts," found in the revision of 1855, was omitted; and section 4, providing for the assignment of accounts, is nowhere re-enacted. But this section was wholly unnecessary. Ever since the adoption of the code in 1849 it is necessary that every action be prosecuted in the name of the real party in interest, and if one owns a contract or account not assignable at common law, he should bring suit in his own name.

Gamble, J., in *Walker v. Mauro*, 18 Mo. 564, says: "The effect of our new code of practice in abolishing the distinction between law and equity, is to allow the assignee of a chose in action to bring suit in his own name in cases where, by the common law, no assignment would be recognized." This opinion was given in 1853, and before the enactment of said section 4, now dropped from the statutes.

The judgment of the District Court is affirmed.

The other judges concur.

¹ Counsel for plaintiff in error submitted the following points: At common law this account, being a chose in action, was not assignable. It is not made assignable by our statute. The only statutory provision we have ever had on this subject was contained in section 4, chapter 21, R. C. 1855. Whatever of that chapter it was intended to retain was placed in the revision of 1865. *Wagn. Stat.* 239, note 1. This was omitted (§ 4, ch. 21), and was subsequently repealed. *Wagn. Stat.* 896, §§ 2, 3.

² The argument for defendant in error is omitted.

GREEN v. MARBLE.

SUPREME COURT OF IOWA, DECEMBER TERM, 1873.

[37 Iowa, 95.]

Action at law. One Wilson executed his promissory note to defendant, who, after maturity, transferred it to Groat, and executed a guaranty in the following words :

"I guarantee the payment of the within note within thirty days from the 17th day of October, 1870.
ELIAS MARBLE."

Before the expiration of thirty days Groat orally assigned the note and guaranty to plaintiff.

There was a trial to the court, with judgment for plaintiff. Defendant appeals.

E. P. Baker and *E. W. Eastman*, for the appellant.

Rice & Moffitt and *H. C. Hemenway*, for the appellee.

BECK, CH. J.—1. The defendant insists that as the note is not indorsed to plaintiff, and the guaranty is not negotiable, recovery can only be had, if at all, in equity. But as no objection was made in the court below as to the form in which the suit was prosecuted, an error in that respect will avail the defendant nothing in this court.¹

2. The verbal assignment of the note and guaranty transferred to plaintiff the property in the choses in action of which these instruments are the evidence. Plaintiff thus became the real party in interest—the one entitled to the chose in action—and may maintain a suit in his own name to recover upon the guaranty.²

The judgment of the circuit court is sustained by the facts and the law of the case ; let it be *Affirmed.*³

¹ Rev., §§ 2613, 2616, 2619; *Taylor v. Adair & Goff*, 22 Iowa, 279; *Van Orman v. Merrill*, 27 Iowa, 476; *Hatch v. Judd*, 29 Iowa, 95.

² *Citing*, Rev., § 2757; *McDowell v. Bartlett*, 14 Iowa, 157; *Conyngham v. Smith, et al*, 16 Iowa, 471; *Yunker v. Martin*, 18 Iowa, 143; *Cottle v. Cole*, 20 Iowa, 482; *Rice v. Savery*, 22 Iowa, 470; *Pearson v. Cumings*, 28 Iowa, 344.

³ See *Andrews v. McDaniel* (1873), 68 N. C. 385; "The real owner of a negotiable note, not indorsed, is the proper person to sue for its recovery, under section 55 of the code of civil procedure." *Schmier v. Fay* (1873), 12 Kan. 184. When a note payable in work has been sold and delivered to a third party, the latter can maintain an action thereon in his own name.

Compare also the remarks of DILLON, J., on the distinction between *negotiability* and *assignability*, in *Yunker v. Martin* (1864), 18 Iowa, 143, 145: "By the law merchant, the note in suit not having been indorsed to Royston, he could not have brought suit thereon in his own name, although he was the beneficial owner; but the action must have been brought in the name of the payee. *Franklin Bank v. Raymond*, 3 Wend. 69, 71, per Marcy, J.; *Chitty on Bills*, 5 Am. ed. 227; 2 *Parsons on Notes and Bills*, 44, 52, and cases cited in note. But this is changed by chap. 117 of the Rev., §§ 2757, 2760. These sections would give Ralston, as the equitable assignee and real owner of the note, a right to sue in his own name, but without prejudice to any set-off or other defence existing before notice of the assignment. Notes are choses in action, that is, things which must be recovered by action at law; and like all other things in action, they may be assigned, and the title will pass without indorsement. *Houghton v.*

CUSHMAN v. WELSH.

SUPREME COURT OF OHIO, DECEMBER TERM, 1869.

[19 O. S. 536.]

Error to the court of common pleas of Union County. Reserved in the district court.

At the May term, 1867, of the common pleas of Union county, the defendant in error obtained a judgment against the plaintiffs in error for \$523.50. The judgment was obtained by confession under a warrant of attorney annexed to the note on which it was rendered. No process was issued against the defendants below, and they had no notice of the proceeding until after the judgment was rendered.

The note is made payable to Rickley & Brother, or order. Following the note, and preceding the signature of the makers, there is attached to the note a warrant of attorney, empowering any attorney of any court of record to appear for the makers of the note in any court of record in the State of Ohio, and waive the issuing and service of process against them, and to "confess judgment in favor of the legal holder" of the note against them, for the amount due thereon. To the note and warrant of attorney are attached the signatures and seals of the plaintiffs in error, defendants below.

At the same term of the court at which the judgment was rendered, the plaintiffs in error filed their motion to set aside the judgment on the ground that the court had no jurisdiction of the defendants in the case. The court overruled the motion; and the defendants, now plaintiffs in error, excepted, and filed their petition in error in the district court, and assigned for error the overruling of their motion.

The case was reserved by that court for decision here.

John B. Coats, for plaintiffs in error.

M. C. Lawrence, for defendant in error.¹

Dodge, 5 Bosw. 326; 6 *Id.* 427. These sections simply substitute the rule of courts of equity which permitted the assignee of a chose in action, he being in fact the real owner, to proceed in his own name. (2 Parsons on N. & B., *supra*; Edw. on Bills, 251, note 286, and cases.) But they do not otherwise enlarge the substantial rights of such assignee.

"The judgment of the court below overlooks the radical distinction between the *indorsement* (using the word in its proper sense) and the *assignment* of a negotiable note. In a legal as well as mercantile sense, and within the meaning of § 1794 of the Revision, above cited, a note payable to order, to be negotiated by indorsement, must be indorsed by the payee by proper writing, and by subsequent indorsers, if any, to the holders. And without such an indorsement the holder can not insulate himself from prior equities. When thus *indorsed* for value, before due, and without notice, the holder stands free from all equities between the original parties. It is only by the law merchant, and our statute recognizing and adopting it, this being founded upon the policy of sustaining the credit of negotiable paper, that an indorsee may recover when the payee may not. 3 Kent Com. 79. But where such a note is transferred without indorsement, the holder, although he obtains title, is not an *indorsee*, but an *assignee*, the assignee of a chose in action, and, as such, liable to any defence or set-off existing before notice of the assignment." *Rev.*, § 2760; *Chamberlain v. Gorham*, 20 Johns. 144, and authorities above cited."—*Ed.*

¹ The arguments are omitted.

DAY, J.—The question in the case is made on the order of the court, overruling a motion to set aside a judgment rendered against the plaintiffs in error, on a sealed note or bill, by virtue of a warrant of attorney. The ground of the motion was, the alleged want of jurisdiction of the court below of the defendants in the case. The court had no jurisdiction of them, other than that obtained through the warrant of attorney attached to the note upon which the judgment was rendered.

The question, then, is, whether the confession under the warrant of attorney gave the court jurisdiction of the defendants below, to render judgment on the note against them in favor of the plaintiff below.

The note is made payable to "Rickle & Brother or order." It is under seal, and was not negotiated by indorsement, as authorized by the statute. It is averred, however, that the plaintiff below became the owner and holder of the note by purchase of Rickle & Brother, and paid them therefor the full amount of the note. Though he might, as the owner of the note in equity, have brought an action thereon, under the provisions of the code, in his own name, against the makers of the note, it does not follow that he could obtain judgment by confession on their warrant of attorney attached to the note. That depends on the extent of the power conferred by the warrant. The attorney can do nothing more than execute the power conferred by his warrant; moreover, "all authorities of this sort must be strictly pursued." *Cowie v. Allaway*, 8 Durnf. & East, 257. "Indeed, formal instruments of this sort are ordinarily subjected to a strict interpretation, and the authority is never extended beyond that which is given in terms or which is necessary and proper for carrying the authority so given into full effect." Story on Agency, sec. 68.

Now, the power conferred by the terms of the instrument in this case was, to confess judgment only "in favor of the legal holder" of the note. The plaintiff below was not the "legal" holder of the note, for the note had not been indorsed to him. He could become the "legal holder" of the note only "by indorsement thereon," as authorized by the statute. S. & C. Stat. 862; *Avery v. Latimer*, 14 Ohio, 542.

The waiving of process and confession of judgment in favor of the plaintiff below, was not, then, within the authority conferred by the power of attorney. Under the rule of interpretation applicable to such instruments, we must conclude that the jurisdiction of the defendants below, obtained through the warrant of attorney only, and the confession of judgment by means thereof, exceeded the authority conferred by the defendants in their power of attorney, and that the court, therefore, erred in overruling their motion to set aside the judgment, irregularly obtained against them.

The negotiability of a warrant of attorney, with the note to which it is attached, was questioned in *Marsden v. Soper*, 11 Ohio St. 503; and denied in *Osborn v. Hawley*, 19 Ohio, 130. But it is not necessary to

pass upon the question in this case, for the judgment must be reversed on the ground already stated.

BRINKERHOFF, C. J., and SCOTT, WELCH, and WHITE, JJ., concurred.¹

WALKER v. STEEL.

SUPREME COURT OF COLORADO, OCTOBER TERM, 1886.

[9 Colo. 388.]

Appeal from County Court of Gunnison County. The action was brought in his own name by a member of a dissolved partnership, to recover on a partnership account acquired by him on the dissolution of the firm.

W. H. Fishback, for appellant.

Thomas and Thomas, for appellee.

HELM, J.—There was in this case no defect of parties plaintiff. The partnership had, in fact, been dissolved several months when the suit was brought; and plaintiff, through the settlement between himself and copartner, and his purchase of the partnership property, had become the exclusive owner of the account sued on. He was therefore the only party really interested in collecting the balance due. Hence, under section 3 of the Code of Civil Procedure, the action was properly brought in his name alone. *Bassett v. Inman*, 7 Colo. 270.

The common law principle that an action for a partnership debt, whether instituted before or after dissolution of the firm, must be

¹ Cf. *Clements v. Hull* (1878), 35 O. S. 141. Here the power of attorney authorized any attorney at law "to confess judgment in favor of the holders of said note." It was held that this authorized a judgment in favor of an equitable owner and holder to whom the note had been transferred by delivery but without indorsement. "The code of civil procedure," said McILVAINE, J., "provides that every action must be prosecuted in the name of the real party in interest, and the case before us being within this rule, we think, it must have been in the contemplation of the donor of the power, as it is clearly within the words of the grant, that the attorney should confess judgment in favor of such equitable owner and holder.

"The scope of the power is not limited, in this case, as it was in the case, *Cushman v. Welsh*, 19 Ohio St. 536, in favor of the legal holder only. The authority here given is 'to confess judgment in favor of the holder of said note,' and we think these words were intended, and should be construed, to embrace any holder who might lawfully prosecute an action on said note, in his own name and for his own use."

The negative side of the doctrine reappears in *Spence v. Emerine* (1889), 46 O. S. 433. Here a warrant of attorney attached to a sealed note payable to the payee or bearer, authorized "any attorney at law, at any time after the above sum becomes due, with or without process, to appear for us in any court of record in the state of Ohio, and confess judgment against us, for the amount then due thereon, with interest and cost, and to release all errors and the right of appeal." It was held—

(a) Such warrant of attorney conferred no authority to confess judgment against the maker of the note, in favor of the holder to whom the payee had transferred the note by delivery.

(b) In an action on the note, it was error to render judgment against the maker thereof in favor of such holder, by virtue of such warrant of attorney, without summons or other notice to the maker of the bringing of the action.—*Ed.*

prosecuted in the name of all the partners, does not, under the present practice, and the facts disclosed, apply to this case.¹

*Affirmed.*²

LANE *v.* DUCHAC AND OTHERS.

SUPREME COURT OF WISCONSIN, MARCH, 12, 1889.

[73 Wis. 646.]

This action is to foreclose a mortgage executed by the defendants Joseph Duchac and wife to Barbara M. Rhyner, on certain lands in Langlade county, to secure the payment of an unnegotiable promissory note for \$300, and interest, given by said Joseph Duchac to said Barbara. The note and mortgage were given for a loan of money, and bear date May 29, 1883. The loan was made to Duchac by one Schintz, a land and loan agent, through the firm of Deleglise & Hutchinson.

Barbara M. Rhyner was the maiden name of the wife of one Zentner, a client of Schintz. The latter had loaned money for Zentner at different times, and for some of those loans had taken securities in the maiden name of Mrs. Zentner, with her consent and by the direction of her husband. Schintz was orally authorized by both of them to execute receipts, etc., in her maiden name. Schintz was also accustomed to make other loans in the name of Barbara M. Rhyner, with her consent.

The money loaned to Duchac did not belong to Zentner or his wife, and was not loaned as the money of any particular client of Schintz. The latter had in his hands when this loan was made more than \$300 of the money of the plaintiff, Lane, who was also one of his clients, to be loaned for him, and from whom Schintz had a general authority to invest the money in his discretion. On June 5, 1883, which was almost immediately after he received the note and mortgage from Deleglise & Hutchinson, Schintz charged the amount of such note to the plaintiff; and at the same time assigned, or attempted to assign, the mortgage to the plaintiff by a written assignment executed by him in the name of said Barbara. He attested such assignment and attached thereto his certificate, as a notary public, of the acknowledgment thereof by Barbara. He retained the papers in his hands until after the action was commenced, and until that time plaintiff was not informed of the transaction.

¹ Only so much of the case is given as relates to the one point.

² "We are not aware of any rule of law which prevents one partner from assigning to his copartner his interest in the particular debt due such partners; and under our code of procedure, when such claim is so assigned, the individual partner may, and in fact must, sue upon it in his own name. See section 2605, R. S."—*Per* TAYLOR, J., in *Stuckey v. Fritzsche* (1890), 77 Wis. 329, 333.—*Ed.*

On August 15, 1883, Duchac refunded the \$300 to Deleglise & Hutchinson, who agreed to obtain the note and mortgage then in the hands of Schintz, and a release of the mortgage, but failed to do so. Duchac then mortgaged the same land to one Barnes, who knew of the mortgage in suit. Barnes afterwards foreclosed his mortgage, purchased in the land at the foreclosure sale, and conveyed the same by warranty deed to the defendant McCully. The latter had no actual notice, when he purchased the land, of the existence of the mortgage here in suit. . .

The circuit court held that there was no valid registry of the mortgage, and because the defendant McCully had no actual notice, of the mortgage when he purchased and paid for the land, that his rights were paramount to those of the plaintiff under his mortgage. The court thereupon gave judgment dismissing the complaint upon the merits. The plaintiff appeals from the judgment.

Kennedy & Schintz and Thomas Lynch, for appellant.

G. G. Sedgwick and Nash & Nash, for respondent.

LYON, J.—II. The question of the validity of the registry of the mortgage being thus determined in favor of the plaintiff,¹ the defendants who have interposed answers maintain that the judgment is correct on other grounds, and they seek to uphold it on those grounds, under the rule of *Maxwell v. Hartmann*, 50 Wis. 660, and other cases, that the exceptions of the respondent are available on appeal to save the judgment. Such exceptions raise, in this case, and we think are all presented in, three questions. These are: (1) Is the mortgage void because the name of Barbara M. Rhyner (which it is claimed is a fictitious name) is inserted therein as mortgagee? (2) Does the evidence show any effectual assignment of the mortgage to the plaintiff? and (3) Did the payment of the amount of the mortgage debt by the mortgagor Duchac to Deleglise & Hutchinson satisfy such debt? These questions will now be considered in their order.

1. An examination of the testimony satisfies us that the \$300 loaned by Schintz to the defendant Duchac, although Schintz may have received the money from his clients to be loaned, was, in contemplation of law, the money of Schintz, and that as between him and Duchac he was the owner of the note and mortgage given therefor. He was responsible for the money so received by him, and it does not appear that he used the funds of any particular client or any person other than himself in making the loan. Had the securities been executed to him in his own name, we do not doubt he could have maintained an action upon them.

It is not true that a fictitious payee and mortgagee is named in the note and mortgage. Barbara M. Rhyner is not a fictitious person, but a person *in esse*. True, since her marriage she is entitled to the name of her husband, Zentner, but we are aware of no law that will

¹ Part of the statement and of the opinion on this point is omitted.

invalidate obligations and conveyances executed by and to her in her baptismal name, if she chooses to give or take them in that form. Hence, were she the owner of the note and mortgage in suit, it would be no defence to her action upon them that they were executed to her by her baptismal name. Neither is it a defence in an action upon them by any other owner that Schintz, with her consent, took them in her baptismal name for a loan made by himself. It is not unusual for a person to take securities in the name of another who has no interest in them, but that does not invalidate the securities or prevent the person beneficially interested from enforcing payment of them by action.

2. Schintz, being the owner of the note and mortgage, was competent to transfer the same to the plaintiff. In view of the course of business between them, as disclosed in the testimony, we think when he charged the amount of the mortgage debt to the plaintiff such transfer was made. It is not important that the papers remained in the hands of Schintz, or that he did not report the transaction to the plaintiff until long after. The relations between them were such that Schintz could lawfully make the transfer without consulting the plaintiff. If ratification by the plaintiff is essential to the validity of such transfer, the bringing of this action founded upon the transfer, or the failure to repudiate it, is a sufficient ratification by the plaintiff of the acts of Schintz. Moreover, Schintz had authority from the mortgagee to sign her baptismal name to the assignment of the mortgage to the plaintiff. Of course he was not competent to attest the same instrument, and certify her acknowledgment thereof before himself as a notary. But neither attestation nor acknowledgment, nor even a written assignment, are essential to the validity of the transfer of the note and mortgage to the plaintiff. A valid sale and transfer of the note could be made by parol so as to vest the same and the mortgage debt of which it is the evidence in the purchaser, and such sale would carry with it the mortgage, as the incident of the debt, without any written assignment thereof. The adjudications in this state and elsewhere to this effect are very numerous. Some of the cases are cited in the brief of counsel for plaintiff.

It is immaterial that the note is not negotiable. A sale of it transfers to the purchaser the mortgage given to secure its payment as effectually as though the note were negotiable. It must be held that the plaintiff was the owner of the mortgage when this action was commenced.

3. When the mortgagor Duchac paid Deleglise & Hutchinson the \$300 for the purpose of discharging the mortgage in suit, he knew that the note and mortgage were not in the hands of that firm, but had been sent to Schintz. Deleglise & Hutchinson did not attempt to release the mortgage, but only undertook to procure a release from or through Schintz. Duchac took the risk of getting the release in that manner. Had the securities been in the hands of Deleglise & Hutchinson and

they had surrendered them to Duchac, or discharged the mortgage, we should have the question of their authority to do so to determine. But Deleglise & Hutchinson assumed to do nothing of the kind, and the question of their authority to discharge the debt is not here. We also think the testimony insufficient to prove that the firm had general authority to collect money for Schintz before the same became due, or that the course of business between them was such, to the knowledge of Duchac, that he had the right to assume that such authority had been given by Schintz.

Our conclusion is that the defendant's exceptions are insufficient to sustain the judgment. The judgment of the circuit court must therefore be reversed, and the cause will be remanded with directions to that court to give judgment to the plaintiff of foreclosure and sale as demanded in the complaint.

By the Court.—Ordered accordingly.

STEEPLE v. DOWNING.

SUPREME COURT OF INDIANA, MAY TERM, 1878.

[60 Ind. 478.]

From the Elkhart Circuit Court.

R. M. Johnson, J. D. Osborn, and E. G. Herr, for appellants.

J. H. Baker, J. A. S. Mitchell, and J. A. Quackenbush, for appellees.

WORDEN, J.—This was an action by the appellees, against the appellants, to recover possession of a certain tract of land.

Issue; trial; verdict and judgment for the defendants. New trial granted the plaintiffs, under the statute, on payment of costs; the second trial resulting in a verdict and judgment for the plaintiffs. The defendants below appeal. . . .

The complaint, the sufficiency of which is called in question, was as follows, viz.:

"The plaintiffs, Lewis Downing, Helms Downing, Sample R. Downing, Theodore Downing, Susannah Laffey, Bernard Laffey, her husband, Zelia Chase, and Sidney E. Chase, her husband, Lucy Jane Weeks, and Nelson Downing, complain of the defendants, George Steeple and Rose Steeple, and say they are the owners, and lawfully entitled to the immediate possession, of the following described real estate, situate in Elkhart County, in the State of Indiana, to-wit: All that part of the south-east quarter of section six (6), township thirty-seven (37) north, of range five (5), lying and being south of the St. Joseph river; which real estate, above described, the defendants have possession of without right, and unlawfully detain from the plaintiffs.

"Wherefore, plaintiffs pray judgment for the possession of said real estate, and one thousand dollars for the detention thereof."¹

The defendants answered in five paragraphs. The first was the general denial. To the third, a demurrer for want of sufficient facts was sustained. We have not considered whether the third was sufficient in law, because all defences could have been given in evidence under the general denial, and hence no harm could have been done in sustaining the demurrer.

The fourth paragraph of answer was as follows:

"And, for a fourth and further answer to the plaintiffs' complaint herein, the said defendants say, that the said plaintiffs are not the real parties in interest; that, prior to the commencement of this suit, the said plaintiffs sold and conveyed the real estate described in the complaint to one John Weston, and therefore, at the time of instituting the suit, had no interest in the subject-matter thereof."

To this paragraph of answer the plaintiffs replied, first, by denial, and second, as follows:

"And, for second and further reply to the fourth paragraph of the defendants' answer, the said plaintiffs admit that they did, prior to the commencement of this suit, by deeds of conveyance, bargain, sell, and convey to the said John Weston the real estate in the plaintiffs' complaint mentioned; but said plaintiffs say, that they are not, nor ought they to be, precluded thereby to prosecute their aforesaid action in this behalf, because, they say, that, at and prior to the date of the execution of said deeds of conveyance by them, the said plaintiffs, to said John Weston, alleged in said answer, the said defendants, George Steeple and Rose Steeple, were in the actual occupancy and enjoyment of said real estate mentioned in the complaint, under a pretended deed of conveyance thereof to them, or one of them, and holding and enjoying the same under a pretended claim of right and title, and adversely to the plaintiffs and to the world; whereby, as to them, the said defendants, the said deeds of conveyance from the said plaintiffs to the said John Weston are champertous and void; and they, the said plaintiffs, have good right and lawful authority to prosecute this suit for the use and benefit of their said grantee.

"Wherefore," etc.

A demurrer to this paragraph of reply, for want of facts, was filed by the defendants, and overruled. This, it is claimed, was error.

A conveyance of land, though by the rightful owner, while it is in the adverse possession of another claiming to be the owner thereof, is absolutely void as to the party in possession and his privies. The *German Mut. Ins. Co. of Indianapolis v. Grim*, 32 Ind. 249, and cases there cited.

¹ A portion of the opinion, considering an objection that the complaint in terms designated the defendants as the owners of the land, is omitted. The Court was of opinion that the word "*they*," used in the complaint, may be understood to relate to the plaintiffs who had been previously named and not to the defendants.

Such deed, therefore, does not vest the grantee with the title to the land, as against the party in possession; nor can the grantee maintain an action in his own name, to recover the land, against the party thus in possession when the deed was executed.

But such deed is good as between the parties thereto, and it authorizes the grantee to bring an action in the name of the grantor, against the party in possession, to recover the land; and the recovery will inure to the benefit of the grantee.

We make the following quotation from the opinion delivered by Bronson, J., in the case of *Livingston v. Proseus*,¹ 2 Hill, 526, as being applicable to the case here:

"It is extremely well settled, that a conveyance of lands which are at the time held adversely to the grantor, is inoperative and void. It would seem to follow from this doctrine that the title remains in the grantor, and that he may assert it in the same manner as though the deed had not been made. But it is equally well settled, that as between the grantor and the grantee, and persons standing in legal privity with them, the deed is operative and passes the title. *Jackson v. Demont*, 9 Johns. 55; *Livingston v. Peru Iron Co.*, 9 Wend. 516, per SAVAGE, C. J.; *Van Hoesen v. Benham*, 15 Wend. 164. From these two propositions, to-wit, that the owner has parted with his title, and that the grantee can not assert it on account of the adverse holding which avoids the deed, it has been supposed to result as a necessary consequence that the title was extinguished or lost. But it has been denied that any such consequence follows. *Jackson v. Brinckerhoff*, 3 Johns. Cas. 101; *Jackson v. Vredenburg*, 1 Johns. 159; *Williams v. Jackson*, 5 Johns. 489; *Jackson v. Leggett*, 7 Wend. 377. Indeed it may be laid down as a maxim in the law, that a title which once existed must continue to reside somewhere; it can not be annihilated.

"The whole apparent difficulty arises from an inaccurate statement of the consequence which results from the adverse holding at the time the deed is executed. It is often said in the books, without any qualification, that the deed is void. But that is only true in relation to the person holding adversely, and those who afterwards come in under him. As to all the rest of the world the deed is valid, and passes the title from the grantor to the grantee. This I think is sufficiently established by the cases already mentioned and the authorities on which they rest. The deed is void as against the party who might otherwise be injured; but it is good as to all others. If the person who held adversely voluntarily abandon the possession, there can be no doubt that the grantee may enter and enjoy the land. Or, if after such abandonment a stranger enter, the grantee may bring ejectment and oust him. The stranger was in no peril of being injured by the conveyance. His entry

¹ Decided by the Supreme Court of New York in 1842.

was tortious, and he shall not cover himself with a shield which belongs to another, between whom and himself there is no legal privity.

"But as against a person holding adversely, the deed is utterly void—a mere nullity. There was an attempt to convey, but the parties failed to accomplish the object. The title still remains in the original proprietor, and he may, indeed must, sue to recover the land. It is true that the recovery will inure to the benefit of the grantee in the deed; but that is a matter between him and the grantor, and with which the person holding adversely has nothing to do. It is enough for him that the deed does him no injury.

"When it has been apprehended that a deed might be attacked on the ground of an adverse holding at the time it was made, it has been usual to insert counts in the declaration on the title of the grantor and the grantee, so that if the suit failed as to the one, it might succeed as to the other. *Jackson v. Leggett*, 7 Wend. 377. But the title is not in both of them, and it is but a poor compliment to the law as a science that it can not decide which ought to sue. It has, I think, settled the question. When the action is brought against the person holding adversely, or any one who has succeeded to his right, the grantor must sue. But as against a stranger—one who does not stand in legal privity with him who held adversely when the deed was made—the grantee must sue. In cases where the grantor may sue, he must of necessity be allowed to show the deed void when the defendant attempts to set it up to defeat a recovery. Otherwise, the defendant would first defeat the grantor by showing he had conveyed, and then defeat the grantee by showing the deed void; and thus we might come, in effect, to the result of extinguishing a good title."

The above doctrine was applied in the case of *Hamilton v. Wright* [1868], 37 N. Y. 502, where it was held, that the grantee in such deed might bring an action in the name of his grantor, to recover possession of the land from the person in the adverse possession when the deed was made.¹

In the case of *Farnum v. Peterson*, 111 Mass. 148, 151, it was said, that, "When it was said that the deed of one who is disseised is void, it is intended only that it is inoperative to convey legal title and seisin, or a right of entry, upon which the grantee may maintain an action in his own name against one who has actual seisin. It is not void as a contract between the parties to it. The grantee may avail himself of it against the grantor by way of estoppel; or by suit upon the covenants; or may recover the land by an action in the name of the grantor." Again, in *McMahan v. Bowe*, 114 Mass. 140, 145, it was said: "The authorities in this state cited by the tenant, show the rule to be established that a deed of a disseisee conveys no title which can be

¹ This decision was under an amendment to the New York code, see p. 188, *ante*, note; see also the amendments on this point which appear in the codes of North Dakota, North Carolina, and South Carolina, indicated on pp. 191, 192, *ante*.—Ed.

enforced in the name of the grantee against the disseisor or his privies, but they go no further. It is now held, that such deed is good against the grantor, and that it entitles the grantee to an action to recover the land, in the name of the grantor, but to his own use, even against the disseisor." See, also, Tyler on Ejectment, p. 939, *et seq.*

We are satisfied, both upon reason and authority, that where one conveys land to another, which at the time is in the adverse possession of a third person, whereby the title can not pass as against the party thus in possession, the grantor impliedly authorizes the grantee to use his, the grantor's, name, in an action to recover the land from the party thus in possession thereof.

It must be assumed that the grantor intends, by such deed, not only to vest the title in the grantee as between the latter and himself, but as against the party thus in possession, and to give the grantee the beneficial enjoyment of the property. The grantee, however, can not have the enjoyment of the property, unless he may use the name of his grantor as plaintiff, in an action to recover it.

If he can not thus use the name of his grantor, his deed conveys no right that he can enforce, and it is a mockery to say that the title passes to him as between his grantor and himself. As the use of the grantor's name in such action as plaintiff is necessary in order to give the grantee possession, and therefore the enjoyment of the property, in accordance with what must have been the intention of the parties to the deed, it seems clear that the grantor, by making such deed, impliedly authorizes the use of his name as plaintiff, in an action to recover the property.

The case is not without its analogies in the law. Thus, before the code, where a chose in action was assigned, the legal title not vesting in the assignee, the latter might have sued upon it in the name of the assignor, and the courts would have protected the assignee in his equitable rights, against the wrongful acts or interference of the assignor. 1 Chitty's Plead., 16th Am. ed., p. 17, n. k.; Chitty's Bills, 12th Am. ed., p. 10, n. 2.

But it is claimed by the appellants, that the code precludes the right of bringing such action in the name of the grantor, by providing that, "Every action must be prosecuted in the name of the real party in interest," etc. 2 R. S. 1876, p. 33, sec. 3. If such must be the construction of the code, then it results, that, where the owner of land has conveyed it while it was in the adverse possession of another, no one could ever maintain an action against the party in possession, to recover it. The grantee of such deed could not, as has been seen, because his deed, as against the party in possession, is void.

If an action can not be maintained in such case in the name of the grantor, it can not be maintained at all; and the party in possession, and those claiming under him, can retain the property for all time, however groundless his claim may have been. We are not inclined to give the code a construction that will lead to such results. We think

the grantor of such deed is the real party in interest in such action, as against the party in possession of the land. The title to the land, as against the party in possession, still remains in the grantor of such deed. So far as the defendant in such action is concerned, the case stands as if no conveyance had been made by the owner at all, for the conveyance, as to the defendant, is a nullity.

How can a party in possession be heard to say that such conveyance, as to him, is void, and at the same time say that it is valid for the purpose of making the grantee the real party in interest? He must be consistent; and when he claims that the deed is void as to him, he must abide by the results that follow. He can not claim that it is void as to him, and yet derive a benefit from it as if it were valid. He can not say that the deed is void as to him, and does not transfer the title, and yet say that the grantor's title is transferred thereby, so as to make the grantee the real party in interest. He can not be permitted thus to "blow hot and cold."

The supposed difficulty in maintaining an action in such case, in the name of the grantor, has been obviated in New York, by an amendment to the code, providing that "an action may be maintained by a grantee of land, in the name of a grantor, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant." *Hamilton v. Wright, supra.*

It has never been decided in New York, so far as we are advised, that, under the code, without the amendment above noticed, an action by such grantee could not be maintained in the name of his grantor, to recover the land. The amendment was adopted, as it would seem, to remove a doubt which had existed on the subject. WOODRUFF, J., in delivering the opinion of the court in the above cited case (p. 507), said: "When, therefore, the code had, in section 111, provided that every action should be brought in the name of the real party in interest, a doubt arose whether an action to recover lands thus conveyed could be brought by anyone. If brought in the name of the grantee, he could, as against the party in possession, show no title; for, as against such party, his deed was void. If brought in the name of the grantor, it might be shown that he was not the real party in interest, because, if he recover, his recovery would inure, not for his own benefit, but for the benefit of the grantee.

"The code was, therefore, amended so as to exclude such a conclusion, by adding to the section the provision," etc. The provision alluded to is the one above set out.

We are satisfied, that, under our code, where land has been conveyed which at the time was in the adverse possession of another, an action may be maintained to recover it from the party thus in possession, in the name of the grantor in such conveyance as plaintiff.

We are of opinion, for the foregoing reasons, that the second paragraph of the reply to the fourth paragraph of answer was good, and that the court committed no error in overruling the demurrer thereto.¹

¹ Part of the opinion on other points is omitted.

See also, *Burke v. Andis* (1884), 98 Ind. 59. The plaintiff, Neal, having failed at a former trial, because the defendant, Burke, was in adverse possession at the date of plaintiff's deed, took a new trial as of right, and asked leave to amend his complaint by substituting the name of his grantors, as plaintiffs. Said the court, per BICKNELL, C. C. (p. 62): "He had a right to sue in their names for his own benefit. *Steeple v. Downing*, 60 Ind. 478. The amendment produced no delay, and no change in the defendant's pleading, and put the defendant under no disadvantage as to his title." The amendment was therefore allowed. Compare Indiana Statutes, § 394, R. S. 1881.

In *Rossell v. Rossell* (1885), 105 Ind. 77, one R., claiming to own land which had been deeded to his infant son, brought an action against the latter to quiet title, which was done. R. then sold and conveyed the land to G. and the latter to P. Afterwards when R.'s son became of age, he appealed from the judgment in favor of his father. P. filed an application to be allowed to defend, either in his own name or in the name of R., showing interest and alleging that R. was insolvent and that he and his son had colluded to procure a reversal of the judgment. Held, that P. could defend in R.'s name, and that a confession of errors filed by R. in the appeal was to be disregarded. Said the court, per ZOLLARS, J. (p. 79): "The grantor in such cases, by his conveyance, authorizes the grantee to protect his right in the property conveyed, by a suit or defence in the name of the grantor, and in such cases the grantor can neither dismiss the suit nor prevent the defence."

Compare *Smith v. Long* (1882), 12 Abb. N. C. 113 [A tract of land, while held adversely by Long, was conveyed by Smith to Talmage, by Talmage to Thomas, by Thomas to Adams, who brings ejectment, suing in the name of the first grantor, Smith]. Said the Court of Appeals, per TRACY, J.: "To hold that a remote grantor can bring such an action in the name of the original grantor would be to encourage dealings in such claims to real estate and nullify the statute which was intended to prevent the party out of possession from transferring his right to litigate the validity of the title. *Sands v. Hughes*, 53 N. Y. 287, 296 [And see 1 New York Rev. Stats., § 147; 2 id., § 6]. We think a grantee, bringing such an action, must bring it in the name of his immediate grantor, and must stand or fall on the validity of his title. We are referred to no case where the action has been maintained by or for the benefit of any one but the first grantee, and we think that a construction which so limits the right of action best accords with the public policy which has so long prevailed in this state relative to this class of assumed titles to real estate held by persons out of possession."—Ed.

2. *Assignment pendente lite.*HASTINGS *v.* MCKINLEY AND ANOTHER.

COURT OF COMMON PLEAS OF THE CITY AND COUNTY OF NEW YORK,
DECEMBER, 1851

[1 *E. D. Smith*, 273]¹

This suit was tried twice. Upon the first trial, the defendants had a verdict and judgment. Upon the second trial the plaintiff had a verdict and judgment, from which judgment the defendants appealed. Upon this appeal the questions arose which appear in the opinion, on the further facts therein stated.²

Elijah Ward, for the defendants.

Hiram P. Hastings, plaintiff in person.

By the Court. WOODRUFF, J.—This action was commenced in the month of February, 1849, in the name of Manuella Montejo de Castellanos, the wife of Pedro de Castellanos, as sole plaintiff, and was founded upon an instrument in writing, dated September 1st, 1848, whereby the defendants, for value received, promised to pay to the order of Messrs. Broint & Bruges the sum of \$500 as soon as certain two cases of merchandise (therein described) should be delivered or tendered to the agents of the defendants at Havanna.

On the 2nd of September, 1848, the payees endorsed the instrument in blank, as follows :

" Pay the within to
M. BROINT,
M. BRUGUES. "

and delivered the same thus endorsed.

The complaint avers that the agreement was procured with the separate funds of the wife ; that she has a separate property not belonging to her husband ; and that the demand in question belongs exclusively to her separate estate.

The answer, so far as it is material to the consideration of this appeal, consisted of a denial of the plaintiff's title to the instrument, and a denial that she had any " separate property from her husband."

On the 21st of May, 1849, the then plaintiff executed an assignment, whereby, in consideration of \$500, she transferred the agreement to the present plaintiff, Hastings, who was her attorney in the action; and her husband, Pedro de Castellanos, subjoined and subscribed his consent to such transfer; and thereupon an order of the court was obtained, entered

¹ Affirmed, *Hastings v. McKinley* (1853), New York Court of Appeals, Selden's Notes (2nd ed.), 173.

² The reporter's statement of the case has been abridged.

May 31, 1849, under § 101 of the code then in force, (§ 121 of the code of 1849¹) by which the present plaintiff, Hastings, was substituted as the plaintiff in the action.

On the trial, the husband of the former plaintiff was called as a witness, and was objected to by the defendants as incompetent. The objection was overruled, and the defendants excepted to the decision.

The exception, with a motion for a nonsuit, present all the grounds which were urged by the defendants' counsel on the argument of the appeal for reversing the judgment.

First. It is insisted by the defendants that a married woman could not sue without joining a *next friend*; and that the substitution of a person competent to sue, though made by order of the court before the trial, did not cure this defect, which was apparent upon the face of the complaint.

Section 127 of the code of 1848, (§ 148 of the code of 1849,) provides that certain objections should be deemed waived by the defendant if not taken by demurrer or answer. Among these are, "that the plaintiff has not legal capacity to sue," and "that there is a defect of parties, plaintiff or defendant."

It appears to me that this section is conclusive against the defendants upon this point. If the plaintiff had no legal capacity to sue, that defect was apparent on the face of the complaint; it is one of the grounds of demurrer expressly named in § 122, (§ 144 of amended code). The defendant might have demurred. By § 126, (§ 147 amended code). if the defects were not sufficiently apparent on the face of the complaint, the defendant might have set it up in his answer; he has done neither, and I see not how the express *statutory* conclusion, compulsory in its terms, that "he shall be deemed to have waived the same," can be avoided.²

¹ Providing that "no action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue"; and that "in case of . . . any other transfer of interest [than by death, marriage, or other disability], the action shall be continued in the name of the original party or the court may allow the person to whom the transfer is made to be substituted in the action."

² In *Gray v. Wells* (1897), 118 Cal. 11, the plaintiff, as assignee of G. F. Gray and H. N. Gray, partners doing business under the firm name of Gray Bros., sued to recover \$364.96, alleged to be due and unpaid for work done and materials furnished by Gray Bros. at the defendant's request. The defendant claimed that plaintiff could not maintain the action, because he was a member of the firm of Gray Bros. and that firm had never filed or published any certificate of partnership as required by the California Civil Code (§§ 2466, 2468). But, said the Supreme Court, per BELCHER, C., "it has been held by this Court that, though persons doing business as partners can not maintain any action upon or on account of any contracts made or transactions had in their partnership name until they have first filed and published the certificate required, still their assignee may maintain such an action (*Cheney v. Newberry*, 67 Cal. 126; *Wing Ho v. Baldwin*, 70 Cal. 194). And the fact that the assignee was a member of the firm is immaterial. It was in effect so held in the case first cited, where the name of the firm was Wm. H. Cheney & Co. and the name of the assignee was William H. Cheney. The point can not therefore be sustained."

So in *Quan Wye v. Chin Lin Hee* (1898), 123 Cal. 185, where the name of the assignor, "Quan On Wing," was "a fictitious name, not showing the persons interested as partners."

Second. In connection with the point that the substitution of Hastings as plaintiff, did not cure the defect, it is urged by the defendant that the transfer being made, *pendente lite*, to the attorney on the record, was void, on the ground of maintenance. On this point it is only necessary to say, that according to the views above suggested, there was *no* defect to be cured; and second, if a new defence of this description arose, *pendente lite*, the defendant should have set it up by supplemental answer, under § 152, (§ 177 of amended code of 1849). This he would have been permitted to do, as one of the conditions of allowing the new plaintiff to be substituted; or if such a defence was *clearly* well founded, and appeared by the plaintiff's own showing, it might have been a sufficient reason why no substitution should be permitted.

We do not intend to intimate that upon any facts appearing on the face of the paper, or that were shown on the trial, there is anything in this supposed defence; but we are clear that, it not having been set up as a defence, the defendant can not now urge the objection.¹

The judgment must be affirmed with costs.

DUNDEE MORTGAGE & TRUST INVESTMENT COMPANY ?.
HUGHES.

UNITED STATES CIRCUIT COURT, D. OREGON, AUGUST 4, 1898.

[89 *Fed. Rep.* 182.]

This was a hearing on a plea setting up matter in abatement.

William T. Muir and *J. W. Whalley*, for plaintiff.

Ellis G. Hughes, in pro. per.

GILBERT, Circuit Judge.—The defendant in this case filed a supplemental answer in the nature of a plea in abatement, alleging: *first*, that in the year 1889 the plaintiff, which is a corporation organized under the laws of Great Britain and Ireland, having its principal business in Dundee, Scotland, was duly and regularly wound up, dissolved, and lost its corporate existence and powers, further than might be

¹ The defendant had urged also that the agreement upon which the suit was brought was not a negotiable note, and therefore was not assignable by the endorsement of the payee in blank. Said the Court, in the third place: "Whether the note was negotiable or not, we deem the endorsement quite sufficient to pass the interest of the payee. It is not now, as formerly, necessary to inquire whether an assignment passes the legal title, so as to entitle the assignee to sue in his own name. Whether his title be legal or equitable, if he have the *whole* interest, he may maintain the action. It is no new proposition that the mere endorsement by the payee of a note *not* negotiable with his own *name* only, is an authority to the holder to fill up the endorsement by an assignment to himself. Indeed, I doubt the *necessity* of any *written* assignment where there is an actual transfer and delivery of the thing in action, with intent to vest the interest in the transferee, so that the court can see that the whole equitable interest and property in the money agreed to be paid is in the plaintiff.

"At all events, I am of opinion that the endorsement in this case, in connection with the proof of interest, was quite sufficient."

necessary to wind up its affairs, and at the present date it had no legal existence; and, *second*, that in September, 1889, the plaintiff had amalgamated with the Alliance Trust Company, a corporation of Dundee, Scotland, and had transferred to the latter company its demand against the defendant, and that under the laws of Oregon it had now no authority to prosecute the present action in its own name. The plaintiff, by replication, substantially denied these allegations. . .¹

Concerning the second question, it may be said that the record leaves it doubtful whether this cause of action has in fact been transferred to the Alliance Company. But conceding that it has been so transferred, I think it may nevertheless be maintained in the plaintiff's name. The Code of Oregon, while providing, as do the codes of other states, that "every action shall be prosecuted in the name of the real party in interest" (section 27, 1 Hill's Ann. Laws), contains the further provision, found in section 38, that "no action shall abate by the death, marriage, or other disability of a party; or by the transfer of any interest therein if the cause of action survive or continue. In case of death, marriage or other disability of a party, the court may at any time within one year thereafter, on motion, allow the action to be continued by or against his personal representatives or successor in interest." In construing these sections of the code, it has been held in this court that the word "prosecuted," as used in section 27, means "commenced," and that when an action has been commenced by the real party in interest his subsequent transfer of such interest "shall not abate the action, or prevent his prosecuting it to final judgment, or its being so prosecuted in his name for the benefit of whom it may concern."²

There can be no doubt that the construction adopted by the court in *Elliott v. Teal*, 5 Sawy. 188, is the true one. Due force and effect must be given to both sections of the Code. They must be construed together. So interpreted, their meaning is that all actions must be prosecuted in the name of the real party in interest, except in cases where, *pendente lite*, he transfers his interest to another. In such a case the transfer does not operate to abate the action, and no order of substitution of parties is required. It is only in case of the death, marriage, or other disability of a party to a pending action that the court is permitted or required to make an order of substitution. Judgment will be rendered for the plaintiff upon the plea.³

¹ Only so much of the opinion is given as relates to the second point. On the first point the Court was of opinion that the Oregon statute limiting the life of corporations, after dissolution, to five years if necessary for the purpose of prosecuting or defending actions by or against them, did not apply to a foreign corporation, and that "the plaintiff corporation still exists for the purpose of winding up its business."—*Ed.*

² *Citing*, *Elliott v. Teal*, 5 Sawy. 188, Fed. Cas. No. 4,396; *French v. Edwards*, 4 Sawy. 128, Fed. Cas. No. 5,097; *Moss v. Shear*, 30 Cal. 475; *Camarillo v. Fenlon*, 49 Cal. 203.

³ Accord, *Douglas v. Muse* (1900), — Kan. —, 61 Pac. Rep. 413, where the answer averred that plaintiff had conveyed his interest since the commencement of the action, and the reply did not deny this under oath, so that, if material, it was admitted.

HIRSHFELD, Suing on his Own Behalf and on Behalf of all Other
Creditors of the MADISON SQUARE BANK, Respondent, *v.*
FITZGERALD ET AL., Appellants.

COURT OF APPEALS OF NEW YORK, NOVEMBER 22, 1898.

[157 N. Y. 166.]

Appeal from an order of the Appellate Division of the Supreme Court reversing a judgment entered upon a decision of the court dismissing the plaintiff's complaint upon the merits on trial at Special Term, and ordering a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.¹

William B. Putney, Henry B. Twombly and John Jeroloman; Franklin Pierce and Charles A. Boston; Joseph Fettretch; John A. Straley,—for different appellants.

Albert Stickney, for certain non-appealing defendants.

Samuel Untermeyer and Louis Marshall, for respondents.²

HAIGHT, J.—This action was brought by the plaintiff, as the creditor of the Madison Square Bank, in behalf of himself and all other creditors of the bank similarly situated, who may chose to come in and share the benefits and expenses of the action, against the defendants as stockholders of the bank, to enforce an alleged liability under section 52 of the Banking Law of 1892.

The Madison Square Bank was organized in 1882 as a banking association, and carried on its business in the city of New York until about the 8th day of August, 1893, when it suspended payment, and an action was brought by the attorney-general for its dissolution, which resulted in a final judgment entered on the 24th day of November, 1893, whereby the banking association was dissolved, and the defendants Miles M. O'Brien and James G. Cannon were appointed permanent receivers. It appears that this action was brought by the plaintiff at the solicitation of the receivers, who agreed with him to pay all the expenses of the action, including counsel fees. The complaint alleges that prior to the commencement of the action the plaintiff requested the receivers to institute an action against the other defendants for the enforcement of their liability as stockholders under the act, and that the receivers, alleging that no cause of action existed in their favor against the stockholders, refused to bring an action, and that they were consequently made defendants herein, but no personal judgment was demanded against them.

Before the trial of this action, certain of the defendants, stockholders of the bank, entered into negotiations with the plaintiff for the purchase of his claim, which resulted in his assigning the same to one

¹ Only so much of the case is given as relates to the one point.

² The arguments are omitted.

Robert Clirehugh, who thereupon stipulated, as owner of the claim, with the attorneys for the defendants, who were stockholders, that the action may be discontinued without costs, and that an order may be entered to that effect, and also stipulating for a substitution of attorneys in the place of the attorney who had brought the action in behalf of Hirshfeld. The court having refused to allow a substitution of attorneys or a discontinuance of the action, Clirehugh executed releases to the defendants, who had joined in and contributed to the purchase of the plaintiff's claim. Thereupon, upon leave of the court, supplemental answers were served by a number of the defendants setting up the sale and assignment by Hirshfeld to Clirehugh and the releases made by him. Upon the trial, which followed, these facts appearing, together with the fact that no other creditor had come in and been made a party to the action, the court held and decided that the plaintiff Hirshfeld was not a creditor of the bank and was not entitled to recover judgment for any sum of money against the stockholders as such creditor; that the action was not prosecuted by the real party in interest for any claim due from the bank, and that there was no party before the court entitled to recover any judgment in the action as and for a debt due from the bank. Judgment was ordered dismissing the complaint upon the merits. From the judgment entered upon this decision the plaintiff and the receivers appealed to the Appellate Division, which court reversed the judgment and ordered a new trial. . . .¹

The Appellate Division appears to have been of the opinion that an action should be properly maintained in the name of Hirshfeld, the plaintiff, after he had sold and transferred his claim to Clirehugh, and after Clirehugh had executed releases to a number of the defendants and sought to discontinue the action. Section 756 of the Code of Civil Procedure provides that "In case of a transfer of interest, or devolution of liability, the action may be continued, by or against the original party; unless the court directs the person, to whom the interest is transferred, or upon whom the liability is devolved, to be substituted in the action or joined with the original party, as the case requires." Under this provision of the Code, it has been repeatedly held that the action may be maintained in the name of the original plaintiff, notwithstanding that he has, subsequent to the bringing of the action, assigned his claim to another party. It is also been held that the bringing in of the party to whom the cause of action has been assigned is discretionary with the court, but, in continuing the action in the name of the original assignor, he is deemed to act for and on behalf of his assignee, and to represent his interest in the litigation. In no case to which our attention has been called has the plaintiff been allowed to continue the action after he has assigned his cause of action in opposition to the wishes and interests of his assignee.

¹ Part of the opinion is omitted.

If his assignee sees fit to settle or demand that the action be discontinued, the provisions of this section furnish no authority for the further continuation of the action or shield for the plaintiff, who, under such circumstances, should continue to prosecute it.

The case of *McGeen v. M. E. R. Co.*, 133 N. Y. 9, is not in conflict with these views. In that case an action had been brought to restrain the operation and maintenance of the defendant's elevated railroad on the street in front of the plaintiff's premises and to recover damages. After issue was joined, the plaintiff conveyed his premises to another party, but expressly reserved all damages caused, or to be caused, by the present, past, or future maintenance and operation of the railroad, together with the fee and easements in the street. In that case it was held that the plaintiff had the right to continue the action to recover his fee and rental damages. Had he not retained the fee and rental damages, but had included them in the conveyance and the purchaser had then settled with the railroad company, a very different question would have been presented.

It is now contended that the action brought by the plaintiff was representative and on behalf of all the creditors of the bank, and that in bringing the action he became a *quasi* trustee for the other creditors, and that he could not settle or discontinue the action. This question is of great importance and should receive careful thought and study; for if the appellants are correct in their contention, stockholders in an action of this kind have only to buy out or settle with the plaintiff to defeat a recovery against them. The courts, however, are not responsible for the statute. Our duty is to construe and not to make it. . . .²

Does the plaintiff, in bringing a representative action, become a trustee for the other creditors? We think not; at least to such an extent as to require him to carry on the litigation for their interests in opposition to his own, or after he has settled his claim. It is true that the capital stock of a corporation is a trust fund for the security of the creditors, and the amount recoverable from the stockholders under the statute in addition to the capital stock may be treated as a like security, but, as we have shown, the creditor is not permitted to bring an action in his own behalf alone for a contribution by the stockholders, for in that way he would obtain a preference for himself. He must bring the action for himself and on behalf, not of all the creditors, but on behalf of those who choose to come in and share the benefits and expenses of the litigation. His relation with the other creditors is one that the law creates. He assumes to prosecute on their behalf only in so far as his personal interests require. He makes no agreement with them, and they do not accept him as a trustee to represent them or bind them by his action. They have the right to come in at any time, and as soon as they do, they may take part in the management of the action. True, it was not necessary for them to come in and be made parties prior to

² Part of the opinion is omitted.

the entering of an interlocutory judgment. When such a judgment is entered, it is effectual for all the creditors, for the court then gives them an opportunity to come in, prove their claims, and share in the recovery. If, however, they neglect to come in and be made parties at such time, they will be barred and not permitted to share in the distribution of the fund.¹

As we have seen, the plaintiff sold and assigned his claim before any of the creditors had come in or had served a notice of motion to be brought in as parties. At the time of the trial he was not a creditor. The person to whom he had sold his claim had stipulated a discontinuance of the action, and had executed a release to many of the defendants. The plaintiff's assignee, therefore, could not and did not wish to continue the action, and the defending stockholders, having settled with him, had the right to have the action discontinued. We must confess that we regret the result reached, but, under numerous authorities in this state and England, to which we have alluded, we think that we are compelled to conclude that the complaint was properly dismissed by the trial court.

The order of the Appellate Division should be reversed and the judgment entered upon the decision of the trial court affirmed, with costs in all courts.

All concur except GRAY and VANN, JJ., dissenting.

*Order reversed, etc.*²

¹ Citing, *Hallett v. Hallett*, 2 Paige, 19; *Kerr v. Blodgett*, 48 N. Y. 66; *Brinckerhoff v. Bostwick*, 99 N. Y. 194.

The court also examined *Inness v. Lansing*, 7 Paige, 583; *Scarth v. Chadwick*, 14 Jurist, 300; *Hanford v. Storie*, 2 Simons & Stuart, 196; *Pemberton v. Topham*, 1 Beavan, 316; *Belmont Nail Co. v. C. I. & S. Co.*, 46 Fed. Rep. 336; *Atlas Bank v. Nahant Bank*, 23 Pick, 480, and reached the conclusion that however it might be elsewhere there was in New York "no escape from the claim made by the appellants that where an action is brought by a plaintiff on behalf of himself and others similarly situated, who come in and share in the expenses, he has the right to control the action and may continue, compromise, abandon, or discontinue it at pleasure until a creditor similarly situated has procured an order to be made a party of the action, or has served a notice of motion to be brought in, or until interlocutory judgment is entered."

² Compare *Walker v. Felt* (1880), 54 Cal. 386, 387: "Had the plaintiff in the action the right to dismiss it, after having transferred his interest in the subject matter of the action to other parties? Section 385 of the Code of Civil Procedure provides that in case of any transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action. Under that section it was the right of the successors in interest in this case to prosecute this action in one of these forms. The party who had transferred his interest divested himself of any power to control the action. He could not dismiss it, because his successors had a right to have it continued. The validity of the order of dismissal in this case rests solely upon the consent of the original plaintiff, given ten years after he had transferred his interest in the action. As he had no right to interfere with the action, the Court, on being advised of that, should have vacated the order based upon it."—*Per* SHARPSTEIN, J.

REYNOLDS, ET AL. *v.* QUAELY, AS ADMINISTRATRIX.

SUPREME COURT OF KANSAS, JULY TERM, 1877.

[18 Kan. 361.]

The opinion states the facts. Reynolds and Reynolds, defendants, bring the case here on error.

A. H. Ayers, for plaintiffs in error.

Cory & Kimball, for defendant in error.

VALENTINE, J.—This was an action on certain promissory notes and a real estate mortgage, executed by Julia J. Reynolds and Geo. A. Reynolds, to R. S. Stevens, and by him transferred to J. J. A. Quaely. In January, 1875, Quaely commenced this action against Julia J. and Geo. A. Reynolds, on said notes and mortgage. Two of the notes were then past due; the third note had four months yet to run before maturity. On 12th July, 1875, Quaely assigned said notes and mortgage to his mother, Catherine Quaely, and four days later, on July 16th, judgment was rendered on said notes and mortgage in favor of said J. J. A. Quaely, and against said defendants. On July 19th, the defendants filed a motion for a new trial. On Sept. 4th, the court still being in session, said motion was heard and sustained. The new trial was granted for the purpose of permitting the defendants to introduce additional evidence in proof of the third defence set forth in their answer. On Nov. 15th, 1875, the death of the plaintiff, J. J. A. Quaely was suggested, and the action was revived in the name of Adah B. Quaely, administratrix of the estate of J. J. A. Quaely, deceased. When J. J. A. Quaely died is not shown by the record. In December, 1875, another trial was had. On this trial the court made the following findings, and rendered the following judgment, to-wit:

The court finds, as conclusions of fact—

1st. That J. J. A. Quaely, deceased, formerly plaintiff in this action, was the owner and holder of the notes and mortgage sued upon herein at the time this action was commenced.

2d. That the judgment heretofore rendered herein, and all rights and benefits accruing therefrom, or to the proceeds of said notes and mortgage, had been on the 12th of July, 1875, assigned and transferred to Catherine Quaely, who is now the owner and holder thereof.

3d. That on the 11th of November, 1875, the plaintiff, Adah B. Quaely, was duly appointed administratrix of the estate, chattels, and credits of J. J. A. Quaely, deceased.

4th. That the remaining facts, beside the above, are as found and decided in favor of J. J. A. Quaely on the former trial of this cause.

And the court finds as conclusions of law—1st. That the plaintiff under the amended petition herein, is entitled to recover upon the notes and mortgage declared upon, of and from the defendants; 2d. That such recovery should be for

and to the use of Catherine Quaely, now the real owner of said notes and mortgage.

And thereupon, (the plaintiff by her attorneys consenting,) it is by the court considered, ordered, and adjudged, that the plaintiff have and recover of and from said defendants, for the use and benefit of said Catherine Quaely, assignee, \$5,458.32, together with the costs of this action, taxed at \$——. And it is further considered, ordered, and decreed, that unless said judgment, interest, and costs, be paid within twenty days from this date, the sheriff of this county shall proceed to advertise and sell, without appraisement, the mortgaged premises, and apply the proceeds thereof as hereinafter provided. [The details of how the property shall be advertised and sold, and how the proceeds thereof shall be disposed of are stated, and then the judgment proceeds as follows:] And execution is awarded for any balance of the judgment remaining unpaid after the sale of said premises and application of the proceeds, as hereinbefore provided.

The defendants below, who are now plaintiffs in error, claim that this judgment is erroneous and illegal. And first, they claim that the actual plaintiff in this action, Adah B. Quaely, administratrix of the estate of J. J. A. Quaely, deceased, has no interest in the subject matter of the action, and that the real party in interest, Catherine Quaely, is not a party to the suit, and therefore that no such judgment as was rendered in this case, could legally be rendered.

They claim, secondly, that a judgment which authorizes a sale of real estate for the satisfaction of a debt, and provides that the proceedings for such sale may be commenced within *twenty days* and that the real estate may be sold *without appraisement*, is not warranted by law. And thirdly, they claim that the court below also erred in rendering a judgment (as the court did below in this case) upon a note which was not due when this action was commenced.

We sustain the first and second claims of the plaintiffs in error, but express no opinion in regard to the third. Said notes and mortgage did not belong to J. J. A. Quaely at the time of his death. They do not now belong to his estate. They are not assets in the hands of the administratrix, and there is no law authorizing the administratrix to administer upon them. (See executor-and-administrator act, Gen. Stat. 439, §§ 39, 40; p. 440, §§ 46, 47, 48; p. 461, § 152). It is probably true, under section 40 of the code (Gen. Stat. 637), that, if J. J. A. Quaely had lived, the action might have proceeded to its final determination in his name, notwithstanding his transfer of interest. But no authority is any where given for allowing such an action to proceed in the name of a personal representative of a deceased person. A person while living may take the risks and chances, and suffer the inconveniences and possible losses, of allowing an action to still proceed in his name after he has transferred all interest in the subject-matter thereof; but after his death, his administrator has no such right. The administrator has a right to attend only to the affairs of the estate. The estate is not to pay him for doing anything else, and the estate is not to take any risks for anything else. Nor does the administrator become the guardian for

those persons for whom his intestate was guardian. Indeed, the administrator is not guardian for any person or for anything except for matters connected with the estate. When J. J. A. Quaely died, the action should have been revived and prosecuted in the name of Catherine Quaely, his successor in interest, and not in the name of his personal representative to whom his right did not pass. (Civil Code, §§ 40, 425, 430.) There might be cases where it would be proper for both the administrator and the person claiming to be the successor in interest to be made parties, and to allow them to interplead for the purpose of determining which was entitled to the judgment that might be recovered.¹

The judgment of the court below will be reversed, and the cause remanded for further proceedings.

All the Justices concurring.

TUFFREE ET AL., RESPONDENTS, *v.* STEARNS RANCHOS COMPANY, APPELLANT.

SUPREME COURT OF CALIFORNIA, APRIL 14, 1899.

[124 Cal. 306.]

Appeal from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial.

The facts are stated in the opinion of the court.

E. W. McGraw, for appellant.

J. S. Chapman, and *Albert M. Stephens*, for respondents.

GAROUTTE, J.—Moses Hopkins, claiming to own an interest in a tract of land, was joined with others as a party defendant in an action to quiet title. Bicknell & White appeared as attorneys for all the defendants. During the litigation and five years prior to judgment, Hopkins transferred his interest in the property to the Stearns Ranchos Company. After judgment, and prior to an appeal therefrom by plaintiffs, Hopkins died. Thereafter Bicknell & White accepted notice of appeal in behalf of all the defendants, and the case was heard and decided in this court upon its merits. Upon the return of the *remittitur* to the lower court a judgment was entered in accordance with the directions therein contained. Whereupon the Stearns Ranchos Company, E. W. McGraw, its attorney, having had itself substituted as a party defendant, moved to amend the judgment as to the interest represented under the name of Moses Hopkins, upon the ground that this court failed to obtain jurisdiction over the Hopkins interest in the realty by reason of the fact of his death at the time the notice of appeal was served upon Bicknell & White. No substitution of any party defendant in lieu of Hopkins was ever made until the substitution of the

¹ Part of the opinion, on another point, is omitted.

ranchos company as stated. The present appeal is now prosecuted from the order of the trial court refusing to amend the judgment as prayed for. . . .

Section 385 of the Code of Civil Procedure reads: "An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. . . . In case of any other transfer of interest the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding." This provision of the law was construed in *Walker v. Felt*, 54 Cal. 386, where the court said: "Section 385 of the Code of Civil Procedure provides that in case of any transfer of interest the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action. Under that section it was the right of the successors in interest in this case to prosecute this action in one of these forms. The party who had transferred his interest divested himself of any power to control the action. He could not dismiss it, because his successors had a right to have it continued. The validity of the order of dismissal in this case rests solely upon the consent of the original plaintiff, given ten years after he had transferred his interest in the action. As he had no right to interfere with the action, this court, on being advised of that, should have vacated the order based upon it." In *Malone v. Big Flat Gravel Min. Co.*, 93 Cal. 384, the court said, "Under this section, if property is conveyed during the pendency of litigation in regard to it, the grantee may thereafter continue to prosecute or defend the case in the name of his grantor, or may cause himself to be substituted in his place." In *Plummer v. Brown*, 64 Cal. 430, it is declared: "After transferring his entire interest in the subject of the controversy, the defendant was only nominally a party to the action. The real parties in interest were his grantees. The entry of his default affected them, not him."

It is quite apparent from these authorities that the statute contemplates the prosecution or defence of the action by the transferee of the interest sold. And he may prosecute or defend in his own name, by obtaining an order of substitution, or he may prosecute or defend in the name of the original party. That the legislature has the power to say that an action may be prosecuted or defended in the name of one, not the real party in interest, we have no doubt.

Hopkins at the time of his death having no interest in the property, his executor or administrator was not a proper party to be substituted as defendant.

It therefore follows that the action either should have been continued in his name or his vendee should have been substituted. Yet the statute and the cases cited plainly say that the vendee has the right to exercise the option of substitution, or continue the litigation in the

name of the original party. If the original party be a mere nominal party, and the vendee is the real party in interest—if the nominal party has no right to conduct the litigation upon any particular lines as against the wishes of the real party in interest; if the real party in interest, the vendee, has the control of the litigation, and this is decided by the cases cited from the reports of this state—then it would seem to be wholly immaterial whether the original party to the action lives or dies. For the purposes of the litigation he is a mere dummy anyhow, a John Doe, *alias*; at least, this must be true aside from any question of costs, and, as to those matters, certainly the real defendant has no reason to complain.

Possibly the opposing party, for reasons readily perceptible, might be desirous of having the real party in interest substituted as a party to the record; but if such party is willing to have matters stand *statu quo*, and the real party in interest is content to have matters proceed upon the old lines, we see no legal bar to the practice. The real plaintiff or defendant simply uses the name of another in the further prosecution or defence of the action.

The Stearns Ranchos Company, a vendee of Hopkins, knew all about the pending litigation. A *lis pendens* was filed. Actual notice of the litigation was before it. By affidavit it is admitted that it had "casual notice" of the appeal to this court. The attorney of the company was E. W. McGraw, who was also a director of the corporation. He is now the attorney representing the corporation defendant upon this appeal.

Prior to the first judgment in the trial court he assisted in the taking of depositions to be used upon that trial, representing some of the defendants. He filed a petition for rehearing in this court, signing himself *counsel* for the defendants. The ranchos company was the owner of the interests of all the defendants before the judgment was rendered in the trial court, and it is quite apparent that it knew all about this litigation from start to finish—at least, as to all material and substantial matters. Under these conditions this conduct upon the part of the ranchos company can only mean that it defended this action in the name of Hopkins from the time it became his vendee, and it should not now be heard to the contrary. The ranchos company knowing that Bicknell & White were appearing at all times and upon all occasions for the defendants, we are confirmed in the belief that these attorneys, as to the question now before us, were representing it in this litigation. In representing Hopkins in name they were but representing the company. The ranchos company, in matters material to the appeal, was a party to the action under the name of Hopkins, and, of necessity, Hopkins' death was wholly an immaterial matter as in any way changing the aspect or situation of the litigation. *Pedlar v. Straud*, 116 Cal. 462, and cases akin to it, do not bear upon the proposition here under consideration.¹

¹ Part of the opinion, on another point, is omitted.

For the foregoing reasons the respective orders refusing to amend the judgment and correct the file marks are affirmed. The judgment and order denying a new trial are also affirmed.

HARRISON, VAN DYKE, MCFARLAND, and HENSHAW, JJ., concurred.

EMERSON ET AL. v. MCWHIRTER ET AL.

SUPREME COURT OF CALIFORNIA, MARCH 31, 1900,

[— Cal. —]¹

The facts appear in the opinion.

Crittenden Hampton and *J. P. O'Brien*, for appellants.

F. W. Street and *W. C. Kennedy*, for respondents.

PER CURIAM.—In an action brought by the plaintiffs to have their title to certain mining property quieted as against defendant McWhirter, judgment was rendered in favor of McWhirter declaring him to be the owner and entitled to the possession of the ground, and forever enjoining the plaintiff from asserting any title thereto. This judgment was entered May 4, 1899, and on May 9th McWhirter's title to the ground became vested in the Yosemite Gold-Mining Company (a corporation) by a conveyance from him. Proceedings in the superior court were thereafter continued between the original parties. The plaintiffs moved for a new trial, and, their motion having been denied September 8th, an appeal was taken by them on the same day from this order and from the judgment, and the record has been filed in this court. A motion is now made by the corporation to be substituted "as party defendant in the place and stead of McWhirter."

The provision of section 385, Code Civ. Proc., that, in case of any transfer of interest in a cause of action, the action may be continued in the name of the original party, "or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding," has reference to a transfer of interest before the entry of judgment in the action. After the rights of the parties to the action have been finally determined, and the judgment thereon entered, others succeeding to their interests in the property affected by the action take the same subject to the judgment, and with all its protection. The provision in the section is permissive, and the discretion of the court in making the order is to be exercised in view of all the circumstances attending the application. In the present case, as the corporation and McWhirter are represented by the same attorney,—the motion for the substitution and the admission of its service being both signed by him,—there would seem to be no occasion for making the order, as the rights of each, both for himself and as against the other, can be adequately protected. The motion is denied.

¹ S. C., 60 Pac. Rep. 774.

IV. THE REAL PARTY IN INTEREST WHEN THE ASSIGNMENT IS SUBJECT
TO A CONDITION, EXPRESSED ON THE FACE OF THE ASSIGNMENT
OR IN A COLLATERAL AGREEMENT.

WEBB & HEPP *v.* MORGAN, McCLUNG & COMPANY.

SUPREME COURT OF MISSOURI, MARCH TERM, 1851.

[14 Mo. 428.]

On July 13, 1849, the plaintiffs below, now the defendants in error, sued on promissory notes, dated Feb'y 20th, 1848, payable eight months after date to L. M. Wiley & Co., and assigned by them, on July 1, 1849, to the plaintiffs. In his answer the defendant Webb admitted the execution of the notes sued on but denied that the plaintiffs were the owners of these notes, and stated that Wiley & Co. were the only persons really interested in them. The answer of Hepp was in substance the same as Webb's. Judgment was rendered below for the amount claimed, with interest. A motion for a new trial was overruled.

It appears that on the trial below the plaintiffs admitted that they had no interest in the notes, and were acting merely as agents for Wiley & Co., to collect the same. The reasons contained in the motion for a new trial are that the court erred in entering judgment against the defendants; that the verdict and finding of the court below were against evidence, against law, and against law and evidence.

Hudson, for appellant.

Kirtley, for appellee.¹

RYLAND, J.—The only question arising in this case is, can an assignee to whom a promissory note has been assigned for collection, bring the suit on the note in his name as assignee, under the new statute regulating the "practice in courts of justice?" The appellants, who were defendants below, contend that the plaintiffs below can not maintain their action, under the above mentioned statute,² because they say that the said plaintiffs were not the party really interested in the suit.

The first section of the 3rd art. of said act is as follows:

"Every civil action must be prosecuted in the name of the real party in interest, except as otherwise provided in the next section.

"Sect. 2. An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, in his own name, without joining with him the person for whose benefit the suit is prosecuted.

"Sect. 3. In case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off, or other defence, existing at the time of, or before notice of the assignment; but this section shall not apply to bills of exchange, nor to promissory notes for the payment of money expressed

¹ The reporter's statement of facts has been abridged; the arguments are omitted.

² The first section of the 3rd article of the new code.

on the face thereof, to be for value received, negotiable and payable without defalcation."

By the act concerning "bonds and notes," passed in 1845 (see Rev. Code, 1845, p. 190) "all bonds and promissory notes for money or property shall be assignable by endorsement on such bond or note, and the assignee may maintain an action thereon in his own name against the obligor, or maker," &c.

There is no doubt that the legislature did not intend by the new act concerning "practice in courts of justice," to repeal the law of 1845, concerning bonds and notes. They well knew that an assignee could sue in his own name; and the 3rd section of the new act above quoted plainly implies the right of an assignee to sue in his own name. But in this case, it is said that the assignees have no interest; they are merely the agents for collection. We consider that the assignment to them creates in them such legal interest, that they thereby become the persons to sue. The assignment passes to them, under the law of 1845, the legal title to the note, and makes it their duty to sue—and we think the court below acted properly in overruling the defendants' motion, and in rendering judgment for the plaintiffs.

Whenever the evidence shows the endorsement in assignment of the note or bill of exchange or bond to the plaintiff, that assignment makes such plaintiff the party in legal interest; and authorizes the action in his name. We can not believe that the legislature intended that the courts should permit a defendant to come forward with such a matter of defence as is here set up. If he has a valid claim or defence against the original, (payee,) he can avail himself of it under the statute; see sec. 3, above quoted.

We think the design of the court below must be consonant with the principles of law, and best calculated to promote right and justice.

Judge Napton concurring, it is therefore agreed that the judgment below be affirmed.

HILTON v. WARING AND REED.

SUPREME COURT OF WISCONSIN, JUNE TERM, 1858.

[7 Wis. 492.]

Action upon a promissory note, brought by the appellant against the respondents.

The complaint states, on information and belief, that on August 3, 1855, the defendants made their promissory note in writing, whereby they promised to pay Enos Beall or order, \$1,288.92, by March 1, 1857, and then and there delivered the same to said Beall; that on April 15, 1856, Beall made his promissory note payable to the plaintiff or order,

on June 1, 1856, for \$537.22; that the said Enos Beall, on April 15, 1856, in writing, assigned and delivered the promissory note of the defendants to the plaintiff, as collateral security for the payment of the said sum of \$537.22, according to the conditions of Beall's said promissory note; that the defendant Waring had notice, and the plaintiff believes that Reed also had notice, of the assignment to the plaintiff, as collateral security of the promissory note made and delivered by them to Beall, before its maturity.

The plaintiff, upon his knowledge, says, that he is now the lawful owner and holder of the said promissory note, made and delivered by the said Enos Beall to the plaintiff, on April 15, 1856, whereby he promised to pay to the plaintiff, or his order, the sum of \$537.22, and that the said Enos Beall is justly indebted to him thereupon, in the sum of \$537.22; that though the said promissory note, made and delivered by the said defendants to the said Enos Beall, and by the said Enos Beall assigned and delivered to the plaintiff, became due before the commencement of this action, yet they, the said defendants, have not paid the same to the plaintiff, or any part thereof.

And the plaintiff further says that he is now the lawful holder of the said promissory note of the defendants, made and delivered by them to Enos Beall, on August 3, 1855, and by the said Beall, on April 15, 1856, assigned to the plaintiff as collateral security, and that the defendants are indebted to him by virtue of said assignment and delivery by said Enos Beall of said note of defendants, thereupon, in the sum of \$1288.92, principal, with interest thereon, from March 1, 1857. Wherefore the plaintiff demands judgment, &c.

A demurrer to the complaint was sustained, and the plaintiff appealed.¹

Smith v. Keyes, for the appellant.

Wheeler v. Kimball, for the respondents.

By the Court, COLE, J.—The objections taken to the complaint by the demurrer, are:

1. That it appears upon the face thereof that the same does not state facts sufficient to constitute a good cause of action; and

2. For that it appears upon the face thereof that there is a defect of parties defendant, in this: it appears upon the face of the complaint that Enos Beall is a necessary party defendant.

We do not deem it necessary to say more in answer to the first objection taken to the complaint, than to remark that in our opinion the complaint does state facts sufficient to constitute a cause of action. Perhaps the complaint unnecessarily sets forth the interest which Hilton, as pledgee, has in the note of the defendants. Being the *bona fide* holder of that note he might undoubtedly have brought his action upon it, and recovered judgment for the amount due thereupon, regardless of any interest the pledger, Beall, might have in the proceeds after the

¹ The reporter's statement of facts has been abridged.

payment of the note which he had given to Hilton. But the fact that the complaint does disclose the true nature of the transaction, and that Hilton took this note as collateral security for the one which Beall had given him, by no means renders the complaint bad.

Neither can we conceive that it was necessary to make Beall a party to this action. It appears he had given a note to the appellant for \$537.22, and to secure the payment of it had turned out the note upon which the suit was brought, as collateral security. What earthly necessity could there be of making him a party to this action? None whatever. He had a residuary interest in the note, to be sure; for, if Hilton realized more than his debt from the security, he would be compelled to account to Beall for the overplus. But it was not necessary that he should be a party to the action to collect the amount of the respondent's note. All interest he had in that matter was that they should pay their note with the least unnecessary delay.

The order of the circuit court sustaining the demurrer must be reversed and the cause remanded to the circuit court for further proceedings according to law. ¹

WILLIAMS v. NORTON.

SUPREME COURT OF KANSAS, FEBRUARY, 1865.

[3 Kan. 295.]

This was an action, tried before a jury, brought on a promissory note alleged to have been transferred to plaintiff as security for a debt, with power to sue in his own name. The plaintiff alleged that at the time of the suit he was the legal owner and holder of the note. Among other defences, including a general denial, the answer denied that the plaintiff was the legal owner and holder of the note sued upon.

The plaintiff having rested, the defendant moved for a non-suit, and the motion being sustained, judgment was ordered for defendant for costs. A motion to set aside the order granting the motion for non-suit was overruled.

W. P. Gambell, for plaintiff in error.

Wm. G. Mathias and *Louis Burnes*, for defendant in error.

By the Court, CROZIER C. J.—The execution of the note was admitted by the pleadings, but the assignment to the plaintiff was denied. The defendant denied that he was the lawful owner or holder of it, and hence was not the real party in interest, as required by the 32d section of the Code.

The evidence showed that there was no written indorsement, transfer, or assignment of the note to the plaintiff. None was necessary to

¹ See also, *Curtis v. Mohr* (1864), 18 Wis. 615; *Union National Bank v. Roberts* (1878), 45 Wis. 373; *Peck v. Yorks* (1878), 75 N. Y. 421; *Butler v. Rockwell* (1890), 14 Colo. 125, 134.

enable him to sue in his own name. A negotiable promissory note may be assigned orally; a mere delivery for a valuable consideration will pass the title. Any beneficial interest in the proceeds of a note, accruing from the payee to the transferee, will, upon a delivery of the note with an understanding that he is to receive the money on it, be a sufficient consideration to vest in the transferee such title as will enable him to sue in his own name; and that too although he may not be entitled to apply to his own use the whole proceeds. A delivery by the payee to his surety or indemnity, with authority to receive the money and pay the principal's debt, will enable the surety to sue in his own name. He will, within the meaning of the Code, be the "real party in interest."

Applying these principles to the testimony of the plaintiff, it will be found sufficient to have warranted a verdict in his favor. The possession of the note was admitted. It went into the possession of the plaintiff by authority of the payee. The former, if not the creditor of the latter, was his surety, and was authorized to receive the money by express stipulation. The existence of these facts would give the plaintiff a right to a verdict, and his own testimony tended to establish all of them. Such being the situation, the court not only erred in dismissing the action, but the error prejudiced the substantial rights of the plaintiff.

Something was said in the argument about the non-production of the note at the trial. There was no necessity of offering it in evidence. Every thing such a performance would have proved, or tendered to prove, was admitted by the pleadings. . . .

The production of the paper being wholly unnecessary as a matter of evidence, the plaintiff was not required from legal considerations to perform an act so entirely supererogatory.

The judgment will be reversed and the court below ordered to set aside the non-suit and proceed with the cause.

All the justices concurring.¹

¹ Only so much of the case is given as relates to the one point.

See also, *Wichita National Bank v. Maltby* (1894), 53 Kan. 567: "In an action upon a certificate of deposit which is in form a negotiable instrument and is not in the possession of the plaintiff, and where ownership is alleged by the plaintiff, an unverified answer, denying that plaintiff is the owner and holder of the certificate and alleging that another was the owner and had drawn the same from the bank, presents an issue for trial which precludes the sustaining of a motion for judgment upon the pleadings without proof."—*Ed.*

GRADWOHL, v. HARRIS AND TURRILL, DEFENDANTS, AND
WAUGENHEIM AND BLUM, INTERVENORS.

SUPREME COURT OF CALIFORNIA, OCTOBER, 1865.

[29 Cal. 150.]

This action was brought to recover moneys alleged to have been advanced by Waugenheim & Blum on the following contract :

"We, the undersigned, agree to refund and pay within thirty days, to Messrs. Waugenheim & Blum, such sum or sums as they may pay to the order or certificate of William A. Johnson, (a foreman of the Silver Mountain Toll Road Company,) given by him to any employees who have labored for said company under him; also, to the order or certificate as above of George Phillips, a foreman of said company, to any employees who have labored for said company under him, with interest thereon from the date of said payments at the rate of two per cent. per month, payable in gold coin of the United States.

"SACRAMENTO CITY, January 10th, 1864.

"LEW B. HARRIS,
M. H. TURRILL."

Plaintiff claimed as the assignee of Waugenheim & Blum. The defendants appealed. The other facts are sufficiently stated in the opinion. *H. H. Hartley*, for appellants.

Coffroth v. Spaulding, for respondent.¹

SHAFTER, J.—The plaintiff sues as assignee of Waugenheim & Blum. The assignment is denied by the defendants in their answer. Waugenheim & Blum intervened, alleging that they were and ever had been the owners of three-fourths of the claim in suit, and praying judgment for the amount. The case was tried by the court and judgment was entered for the plaintiff and intervenors to recover of the defendants the whole claim as an entirety; and it was further ordered and adjudged that the plaintiff was entitled to one-fourth of the amount and the intervenors to the other three-fourths.

First.—The evidence of the plaintiff to prove that the entire claim was assigned to him, was an indorsement in blank by Waugenheim & Blum of a document signed by the defendants, in which the amount due on the contract in suit was stated at \$3,736.46.

Though it was in fact understood by the parties that the beneficial interest to pass by the assignment was limited to one-fourth of the claim, still the plaintiff, as holder of the legal title, could sue for and recover the whole amount. It was competent, however, for the assignors to assert their equitable right by intervening in the action. Had they not intervened they would have been bound by the direct and

¹ The arguments are omitted.

legal operation of the judgment. *Horn v. The Volcano Water Company*, 13 Cal. 62.¹

EATON v. ALGER.

SUPREME COURT OF NEW YORK, ST. LAWRENCE GENERAL TERM,
OCTOBER, 6, 1868.

[57 Barb. 179.]

Appeal from a judgment entered upon a verdict of a jury.

The action was brought in 1858, by Josiah Eaton, then in life, against the defendant John P. Alger, and Wilks S. Alger, since deceased, on a promissory note, purporting to be made by the defendant John P. Alger to Ira M. Clark, and indorsed by Wilks S. Alger, for \$629.75.

The defendants answered separately, and set up the same defences, namely: *First*, that the note was void for usury taken by the payee, Clark; and, *secondly*, that the plaintiff was not the real party in interest, but that the note, at the time of the commencement of the action, belonged to and was the property of Ira M. Clark, the payee in said note, who was the real party in interest in the action.

The action was tried at the Saratoga circuit, in May, 1860, before Justice James and a jury, where the plaintiff was nonsuited on both of the grounds set up in the answer in defence, and judgment was entered up for the defendants, on the verdict. On appeal, this was affirmed by the General Term, but subsequently, on appeal, was reversed by the Court of Appeals, and a new trial granted.

Pending the appeal in the Court of Appeals, the original plaintiff, Josiah Eaton, died, and the present plaintiffs, his administrators, were duly substituted in his place and stead; and the defendant Wilks S. Alger having died, his executors, J. P. Butler and Elihu Wing, were duly substituted defendants in his place and stead.

¹ The judgment was, however, reversed upon a point of evidence, and a new trial ordered.

On the right of the beneficial owner to intervene, see also *Osborn v. McClelland* (1885), 43 O. S. 284: "Sections 3171 and 3172 of the Revised Statutes, which define what instruments are negotiable and provide that the indorsee or holder thereof may maintain an action thereon in his own name, must, in determining who is the proper party plaintiff, be construed in connection with section 4903 of the Revised Statutes, which requires actions to be prosecuted in the name of the real party in interest, except as provided in sections 4994 and 4995. . . This applies as well to negotiable paper as to choses in action, unless the indorsee or holder is protected under the rules of commercial law, by which, if he be such indorsee or holder before due, in good faith, and for valuable consideration, he takes the same free from all equities.

"Therefore, if such indorsee or holder, who is not thus protected, sues to recover thereon, it is a good defence for the maker to show that he is not the real party in interest, unless he is authorized to sue under sections 4994 or 4995.

"So the real owner may intervene and, by cross-petition, obtain the relief to which he is entitled, as against the indorsee or holder who is the apparent owner."—*PER CURIAM*.

Compare *Eitlinger v. Persian Rug and Carpet Co.* (1894), 142 N. Y. 189, given in text, *infra*, and the notes thereto.—*Ed.*

The action was again tried at the Saratoga circuit, in January, 1868, before Justice Rosekrans and a jury.

On the trial the plaintiffs proved the making and indorsing of the note, and rested. The defendants then offered to show that the plaintiffs' intestate, Eaton, said to the defendant John P. Alger, before this suit was brought, that he had no interest in, or title to, the note, but was the mere agent of Clark. This was objected to as irrelevant and incompetent, and because the defendants were not in a position to question the title of the plaintiffs to the note. The objection was sustained, and the defendants excepted.

The defendants then put in evidence the following receipt :

"Rec'd. of Ira M. Clark a note against J. P. Alger, indorsed by W. S. Alger, for six hundred and twenty-five 75 100 dollars, which I agree to account for on demand. Aug. 24th, 1858. JOSIAH EATON."

and in connection therewith again offered the evidence above stated, which was again objected to and excluded, and the defendants excepted.

The defendants then offered to show that it was not designed by the parties that the title to the note, or any interest therein, should vest in Eaton; that he only took it as agent. This was objected to, the objection sustained, and the defendants excepted. The defendants next offered to show that Clark claimed to own the note, and said that Eaton had no interest in it. This was objected to, the objection sustained, and the defendants excepted. The evidence being closed, the defendants' counsel requested the court to charge the jury that the receipt on its face, unexplained, showed the note in suit to be the property of Clark, and that Eaton had no right or title to it, at the commencement of this action. The court refused so to charge, and the defendants excepted. The plaintiffs had a verdict for the amount of the note and interest, upon which judgment was entered, and the defendants appealed.

A. Pond, for the appellants.

E. Cowen, for the respondents.¹

By the Court, JAMES, J. The real question in this case is, whether the defendant should have been allowed to prove that the plaintiffs were not the real owners of the note in suit.

As the Code stood when this action was commenced, every action was required to be brought in the name of the real party in interest, except as otherwise provided. Code § 111. No other provision covered a case like this. It would therefore seem very clear, that a defendant, on such an issue made by the pleadings, would have the right to show that the plaintiff was not the real party in interest, particularly if he had pleaded a defence in the action good as against such pretended real party. The plaintiffs, however, insist that notwithstanding this provision of the Code, the indorsee of a note, or the holder of a note payable to bearer

¹ The arguments are omitted.

or indorsed in blank, may maintain an action upon it, although not in fact the owner, nor, as between himself and the owner, entitled to the proceeds when collected. That such was the rule before the Code, is conceded; and the argument is, that it was abolished by the Code; that the codifiers and legislature so intended. In their report to the legislature the codifiers said, "The rules respecting parties in the courts of law differ from those in the courts of equity; the blending of the jurisdiction makes it necessary to revise those rules to some extent; in doing so we have had a threefold purpose in view: 1st. To do away with the artificial distinctions existing in the courts of law, and to require the real party in interest to appear in court as such; 2d. To require the presence of such parties as are necessary to make an end to the controversy; and 3d. To allow, otherwise, great latitude in respect to the number of parties who may be brought in. . . . The true rule undoubtedly is that which prevails in the courts of equity, that he who has the right is the person to pursue the remedy. We have adopted that rule." This section, now § 111, was adopted by the legislature precisely as submitted by the codifiers, showing that they approved the reasons given by the codifiers for its adoption. It is therefore quite immaterial what was the rule previous to the Code, if thereby the legislature intended to, and did, change the rule, by express enactment. That they did so we think clear, from the language of the statute and the reasons for its adoption. In their reasoning the codifiers allude to the existing rules and the necessity for a revision, one purpose of the proposed change being to require the real person in interest to appear in court as such, followed by an act providing that "every action must be prosecuted in the name of the real party in interest." This reasoning, and this enactment, seem too plain for misconception. This act is emphatic; it uses the Saxon word "*must*," (a verb which has not yet been twisted by judicial construction, like the word "may" and "shall," into meaning something else,) to place beyond doubt or cavil what it intended.

The courts have heretofore held that an action could not be maintained unless in the name of the real party in interest. In *Killmore v. Culver* [1857], 24 Barb. 656, in an action on a note, it was held "that the plaintiff, who held the note merely for prosecution, could not maintain an action, because not the real party in interest." In *Clark v. Phillips* [1860], 21 How. 87, the court said: "This action on a promissory note can not be sustained, because not brought by the real party in interest." And in *James v. Chalmers* [1852], 2 Selden, 215, it was said that "under the Code of Procedure, if it appears that the plaintiff is not the real party in interest, *it is a bar to the action*, and no further defence is necessary."

This covers the entire ground of this case, and shows clearly that the judge at circuit erred in excluding the evidence offered.

But it may be said that the remark in *James v. Chalmers* was not necessary to a decision of the case. If this is conceded, still, as the opinion was concurred in by seven of the eight members of the court, without any objection to the above remark, it illustrates how that section of the Code was understood by the bench.

The importance of the rule enacted by the Code is illustrated in this case. One defence set up is usury. It was charged against the payee of the note, the alleged real party in interest. It was sought to establish this defence by proof of his admissions and declarations; but as he was not a party to the action, they were excluded as hearsay, within the rule of *Paige v. Cagwin*, 7 Hill, 361. Had the action been in Clark's name, his declarations would have been admissible as evidence in chief; and if the real party in interest, he should not be permitted, by a nominal transfer, to defeat the other party in the use of his own admissions and declarations.

It was earnestly insisted that this question had been expressly decided in *City Bank of New Haven v. Perkins*, 29 N. Y. 554, and *Brown v. Penfield*, 36 N. Y. 473. But neither case is in point. The question in each was whether an actual transfer, good in form, and for a valuable consideration, could be impeached by the defendant showing that the transfer was not good as against the other party, and the court held that "nothing short of *mala fides*, or notice thereof, would enable an indorser or acceptor of negotiable paper to defeat an action brought upon it by one who is apparently a regular indorsee or holder, especially when there is no defence to the indebtedness; that as to anything beyond the *bona fides* of the holder, the defendant who owes the debt has no interest; it is sufficient if the plaintiff's title is good as against the defendant."

In this action we are to presume, from the offer, that the plaintiff was not a regular indorsee or holder; that he held the note apparently as agent for the payee, against whom the defendants claimed a good defence. In this view the defendants were interested in questioning the plaintiff's title, and had the right to be heard upon that point.

The question is not whether there was proof showing that the plaintiffs were not the real parties in interest, but whether the defendants could give evidence to prove such allegation. If the defendants could make such proof, the case came within the principle of the two cases last above cited; it would impeach the *bona fides* of the plaintiff's possession, coupled with a legal defence pleaded, which the defendants should have an opportunity to establish, in an action by the real owner.

But upon the broader ground, if the plaintiffs were not the real parties in interest, that of itself, under section 111 of the Code, was a bar to all further proceedings in the action, and a complete defence as against the plaintiffs. The law of this state no longer permits actions to be prosecuted in the name of nominal plaintiffs; the moment that fact appears the action is ended, no matter what the character of the

instrument on which it is founded; whether negotiable or not; or whether the defendant has, or has not, any defence to the indebtedness.

For these reasons the learned judge erred in not allowing the defendants to make the proof offered, and a new trial should be granted; costs to abide the event.

ALLEN *v.* BROWN.

COMMISSION OF APPEALS, NEW YORK, DECEMBER 29, 1870.

[44 *N. Y.* 228.]

Appeal from an order of the Supreme Court at General Term, affirming a judgment in favor of the plaintiff, entered upon the report of a referee.

In the spring of 1858, Constant Cook, Jotham Clark, Trumbull Carey, and the defendant owned certain claims against the Madison and Indianapolis Railroad Company. The defendant was about to go west that spring to settle his own share of the claim, and applied to Cook, Carey, and Clark to take charge of the settlement of their interests in the same matter, and received from each of them power to do so. Each of the parties was to pay one-fourth of the expenses. The defendant went west, made a settlement with the railroad company, and received in full for the claims thirty-six income bonds of \$1,000 each, made by the company; also three notes, made by the company, dated October 1, 1859, one for \$491.61, payable eighteen months after date, one for \$1,404.60, payable two years after date, and the other for \$1,404.60, payable three years after date, and all payable at the office of Winslow, Lanier & Co., in New York. The notes were good security, as found by the referee, and were all paid at maturity. After the notes were paid, the parties interested in them applied to the defendant for their several shares of the avails, and he denied that he had received anything on the notes, alleging that they were worthless. They then severally asked the defendant to give up the bonds he had received from them. This he refused to do unless they would first pay a claim he made for his services and expenses. Defendant did afterward surrender to each of the parties one-fourth of the bonds he received on the settlement, less the coupons, which he had detached for collection. On the 13th May, 1863, Cook, Carey, and Clark assigned all their interest in the demand to the plaintiff, and this action was commenced on 8th June, 1863.

The only controversy in the case is as to the notes or the avails of them. On the trial the defendant claimed that he had sold the notes referred to for less than the face of them. The referee reported in favor of plaintiff for \$2,006.64, on which judgment was entered with costs.

The defendant appealed to the General Term of the seventh district, where the judgment was affirmed, and he appeals to this court.

The complaint set forth the defendant's agency and the receipt of bonds and notes by him, as above, and alleged, among other things, that he had collected and received the whole amount of the notes, with interest, and refused to pay over or account to the assignors of the plaintiff for the same. It contained several other counts as for money had and received. No consideration was in fact paid by the plaintiff upon the assignment to him.

John C. Strong, for the appellant.

D. Rumsey, for the respondent.¹

HUNT, C.—The appellant insisted that the assignment from Cook, Clark, and Carey to the plaintiff, conveyed no title upon which this suit could be brought. This point is based upon the evidence given by Mr. Cook, when he testifies "Allen paid me nothing, and I agreed with him that I would take care of the case, and if he got beat it should not trouble or cost him anything."

I am of the opinion, that the assignment is sufficient to sustain this action. The Code abolishes the distinction between actions at law and suits in equity, and between the forms of such actions. Section 69. It is also provided, in section 111, that every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 113. The latter section provides that an executor, administrator, trustee of an express trust, may sue in his own name. These provisions are intended to abolish the common law rule, which prohibited an action at law otherwise than in the name of the original obligee or covenantor, although he had transferred all his interest in the bond or covenant to another. It accomplishes fully that object, although others than the assignee may have an ultimate beneficial interest in the recovery. In a case like the present, the whole title passes to the assignee, and he is legally the real party in interest, although others may have a claim upon him for a portion of the proceeds. The specific claim, and all of it, belongs to him. Even if he be liable to another as a debtor upon his contract for the collection he may thus make, it does not alter the case. The title to the specific claim is his.²

Judgment affirmed with costs.

¹ The arguments are omitted.

² Citing, *Durgin v. Ireland* (1856), 14 N. Y. 322; *Williams v. Brown* (1866), 2 Keyes, 486; *Paddon v. Williams* (1863), 1 Rob. 340.

Only that portion of the opinion which considers the question in hand is given.

See also, *Cottle v. Cole* (1866), 20 Iowa, 481, 485: "The course of decision in this state establishes this rule, viz: that the party holding the legal title of a note or instrument may sue on it though he be an agent or trustee, and liable to account to another for the proceeds of the recovery, but he is open in such case, to any defence which exists against the party beneficially interested. (*Farwell v. Tyler*, 5 Iowa, 535; *Fear v. Jones*, 6 Id. 169; *Sheldon v. Middleton*, 10 Id. 47.) Or under the Revision, the party beneficially interested, though he may not have the legal title, may sue in his own name. (*Coyningham v. Smith*, 16 Iowa, 471)"—per DILLON, J.

EATON v. ALGER.

COURT OF APPEALS OF NEW YORK, JANUARY 30, 1872.

[47 N. Y. 345.]

Action on a promissory note made by defendant John P. Alger to Ira M. Clark, and indorsed by Wilks S. Alger, since deceased, for the sum of \$629.76.

A. Pond, for appellants.

E. Cowen, for respondents.¹

PECKHAM, J.—It is urged that oral evidence was not admissible to vary or add to the receipt or writing given by the plaintiff when the note in suit was delivered to him. That question was distinctly decided by this court when the case was here before.² It was necessarily decided, and after full examination upon the merits. Whether right or wrong, it is the law of this case.

I do not think the court erred in refusing to non-suit. The evidence established sufficient title in the plaintiff in the note to enable him to maintain this action.

This receipt did not transfer the title. That was, *prima facie*, done by the delivery of the note to plaintiff; the note being payable to bearer. That position was not changed or varied by the evidence of the terms upon which he held it.

The evidence substantially established that the payee of the note (Clark) delivered it to the plaintiff upon his undertaking to collect it at his own expense and to pay to Clark upon its collection \$600, which was the original amount of the note prior to its renewal.

Here, it will be noted, is no agreement to pay to Clark any part or the proceeds of this note, but simply to pay to him so much money upon the happening of an event which the plaintiff agreed to accomplish.

The note is transferred and delivered to the plaintiff under that contract; and in fulfillment of that contract, he proceeds to its collection. The plaintiff is thus made the party in interest, within the meaning of the Code, so as to enable him to maintain this action. *Cummings v. Morris*, 25 N. Y. 625.

This is not like *Langdon v. Langdon*, 4 Gray, 186. There the note was not negotiable, and no transfer of the title in the writing. Here the delivery transferred the title, if so intended between the parties.

Had the plaintiff paid to Clark \$100 on the delivery, and promised to pay \$500 more upon the collection of the note, which he undertook to accomplish, it would not be denied that he was the party in interest. Does it make any legal difference that he agreed to pay the whole consideration money when the note should be collected?

¹ The arguments are omitted; the statement of facts has been abridged.

² *Eaton v. Alger* (1865), 2 K-yes, 41.

Again, suppose he had agreed with plaintiff that he should have the whole note if he would proceed to collect it at his own expense and risk, and had delivered the note under that arrangement; confessedly, the plaintiff would then be the party in interest. Does not the like consequence follow, though the plaintiff should agree to pay a certain sum which was less than the face of the note upon its collection? Is he not then the party in interest in the suit?

He is sufficiently the party in interest in this case, though he has an interest in but a part of the note, and though Clark be the party in interest in the remaining portion; as no such objection is taken as that Clark is a necessary party.

If the evidence showed that Eaton, the plaintiff, had a mere power, it was a power coupled with an interest in the note; and, hence, he was a party in interest in the note.

This, it must be conceded, is a close case, and not free from doubt. It is on the border line. The objection now is purely technical, as the merits have been fully tried, and no other question remains in the case except as to the title to the note. No complaint is made of the admission or rejection of evidence, or of any ruling, except in regard to this question.

There are decisions fully warranting this action, irrespective of the plaintiff's interest, if he sue with the assent of the owner of the note. But we do not put this decision upon that ground. It is well settled that the plaintiff, to maintain this action, since the Code, must be the party in interest, in the same manner he is required to be in any other contract, whether negotiable or not.¹

Judgment affirmed.

CURTISS v. SPRAGUE AND HUSE.

SUPREME COURT OF CALIFORNIA, JANUARY, 1876.

[51 Cal. 239.]

On January 19, 1865, the defendant, Thomas Sprague, made, executed, and delivered his promissory note to the plaintiff, Dennis, in the words and figures following, to-wit:

\$2400.

January 19, 1865.

On the 1st of November, *proximo*, I promise to pay to Thomas Dennis, or order, two thousand four hundred dollars, for value received, in United States gold coin, with interest at the rate of one and one-half per cent. per month.

THOMAS SPRAGUE.

At the time of the making and delivery of the note, the defendant Huse guaranteed its payment by indorsing the same. When the note fell due,

¹ Part of the opinion, dealing with another point, is omitted.

Dennis failed to make demand of payment and give notice of non-payment. Afterwards, and about the month of September, 1866, Huse made a payment on the note, and said to the payee: "Mr. Dennis, I am responsible for that note." Dennis after this indorsed the note in blank, and delivered it to F. Maguire. Subsequently, Maguire assigned the note to Dennis by indorsement, without recourse, and redelivered the same to him. Afterwards, Dennis delivered the note to the plaintiff Curtiss, without receiving any value, but with an agreement that Curtiss should bring suit and divide with him what he recovered. The plaintiff recovered judgment, and the defendants appealed.

Chas. E. Huse, for the appellants.

Albert Packard, for the respondent.

BY THE COURT:—2. There was no error in the refusal of the court below to nonsuit the plaintiff on the motion of the defendants. When the note was delivered to Curtiss, it had on the back the blank indorsement of Dennis, the payee; and "the first effect of an indorsement in blank, is to make the paper payable, not to the transferee as indorsee, but as bearer." 2 Parsons on Notes and Bills, 19. Curtiss, therefore, acquired the legal title to the note, with a corresponding right of action, when it was delivered to him by the payee, indorsed in blank. We attribute no importance to the fact that the note had before been delivered by Dennis with the blank indorsement to Maguire, and that the latter had redelivered it to Dennis, with a special assignment. The title would have been as effectually reinvested in Dennis by mere delivery, without the assignment, as with it; and when Dennis afterwards delivered the note to Curtiss, there was no need that he should again indorse it in blank, in order to convey the legal title, as the blank indorsement already on it was effectual for that purpose.

3. The legal title and right of action being wholly in Curtiss, the court erred in permitting Dennis to be joined as a co-plaintiff. But it was an error which has wrought no substantial injury to the defendants. Nevertheless, in order to preserve a proper consistency in the record, we deem it better to remand the cause for further proceedings.

It is therefore ordered that the judgment be reversed and the cause remanded, with an order to the court below to vacate the order allowing Dennis to be joined as a co-plaintiff, and to enter a judgment on the findings in favor of the plaintiff Curtiss.

¹ A part of the opinion, discussing the guarantor's promise to pay, is omitted.

SHERIDAN v. THE MAYOR &c. OF NEW YORK.

COURT OF APPEALS OF NEW YORK, DECEMBER 22, 1876.

[68 N. Y. 30.]

Appeal from a judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of the defendant, entered upon a verdict, (Reported below, 8 Hun. 424.)

This action was brought originally by Morgan Jones upon an account for work done for, and materials furnished to the defendant; pending the action the claim was assigned by him to plaintiff, who was substituted as plaintiff.

The facts sufficiently appear in the opinion.

Charles P. Shaw, for the appellant.

D. J. Dean, for the respondent.¹

CHURCH, CH. J.—The only question submitted to the jury was whether the plaintiff was the real party in interest. A written assignment, properly executed and acknowledged before a proper officer, was produced in terms transferring absolutely for a valuable consideration the demand in suit from Morgan Jones to the plaintiff, and proof was made of the delivery thereof by the former to the latter. As to these facts there was no dispute, nor could there be any dispute that the plaintiff held the legal title to the demand. The learned judge submitted the question to the jury in this language: "If you believe from the evidence that the real party in interest in this suit is Morgan Jones and that this is a sham transaction, then I think the plaintiff should be defeated in the action."

Precisely what the learned judge meant by a sham transaction, as applied to the transfer of the demand, is not very apparent, but I infer from this and other parts of the charge that he intended to charge, that although a legal title to the claim was transferred to the plaintiff and the assignment was valid as against the assignor, yet if the jury believed that the transaction was colorable, that is, that by any private or implied understanding the transfer was not intended as *bona fide*, or an actual and real sale of the demand as between the parties, the plaintiff could not recover. In this, with great respect, I think the learned judge erred. A plaintiff is the real party in interest under the code, if he has a valid transfer as against the assignor, and holds the legal title to the demand. The defendant has no legal interest to inquire further. A payment to, or a recovery by, an assignee occupying this position, is a protection to the defendant against any claim that can be made by the assignor. In this case, from the undisputed facts, the defendant would be protected if it paid to the assignee or if a recovery

¹ The arguments are omitted.

was had against it by him. No question was made and none submitted to the jury as to the execution or delivery of the assignment, and conceding that the circumstances were such as to justify the jury in finding that it was colorable as between the parties, yet that would constitute no defence on the ground that the plaintiff was not the real party in interest. Such an inquiry might become material if the rights of creditors were involved, or upon the right of interposing some defence or counter-claim against the assignor.

Nor is it of any moment that no consideration was paid for the demand by the assignee. The assignor could give the demand to the plaintiff, or sell it to him for an inadequate consideration, or without any consideration. It is enough if the plaintiff has the legal title to the demand, and the defendant would be protected in a payment or recovery by the assignee. It is not a case of *mala fide* possession which the defendant can avail itself of, as if a thief should bring an action upon a promissory note which he had stolen. These views are well settled by authority.

As before remarked, there was no question as to the making and delivery of the assignment, and the remarks of the learned judges at General Term, therefore, as to when and under what circumstances a jury is or is not justified in finding contrary to the evidence of one or more witnesses, has no application to the question involved in this case, viz. : the *bona fides* as between assignor and assignee of the trans-

1 Referring to *Allen v. Brown* (1870), 44 N. Y. 228, 231; *Slone v. Frost* (1874), 61 N. Y. 614; *Richardson v. Mead* (1858), 27 Barb. 178; *Merrick v. Brainard* (1860), 38 Barb. 574, 579 ["The assignor having a right of action, it was assignable: *Hall v. Robinson*, 2 Comst. 293. The defendants have nothing to do with the question of consideration. The assignment is, on its face, valid, and whether it was transferred for value or was a gift to the defendants [*sic*], is wholly immaterial."—*Per* MULLIN, J.]; *City Bank of New Haven v. Perkins* (1864), 29 N. Y. 554; *Gage v. Kendall* (1836), 15 Wend. 640.

See further, *Peck v. Yorks* (1878), 75 N. Y. 421, 424: "A creditor who holds securities as collateral may always enforce them, for his own benefit, by an action; and it does not rest with the defendant therein to question whether the transfer was merely colorable, or whether any consideration was paid for the same."—*Per* MILLER, J.

Accord also (on the ground that if there is a valid transfer to plaintiff, the defendant has no concern with the consideration): *Francisco v. Smith* (1893), 67 Hun. 225 [assignment of a covenant entered into by the vendor of a business that he would not engage in the same business in the same village]. Affirmed, 143 N. Y. 488. *Bedford v. Sherman* (1893), 68 Hun. 317 [assignment of a claim, on notes of a corporation, against its directors, as being individually liable]. *Costello v. Herbst* (1896), 18 Misc. 176, 180: "The assignment of the claim from Hadden to Brown and from the latter to the plaintiff, were in writing, and it was not objected that they were insufficient in form to pass title to plaintiff. The effort of the defendant to get at the amount of the consideration was without merit, because of the immateriality of the inquiry."—*Per* MCADAM, J. *Toplitz v. King Bridge Co.* (1897), 20 Misc. 576, 578: "Even if no consideration had been paid by the assignee, the defendant would be protected by making payment to him, and, therefore, can not object to his title."—*Per* DALY, P. J. *Linden v. Brustein* (1898), 23 Misc. 655, 656: "There seems to be no doubt that the assignment was valid as against the assignor; and the defendant has no legal interest to inquire whether the transfer was an actual sale or only colorable, or whether there was any consideration paid therefor, or what was the arrangement or understanding between the parties respecting the ultimate disposition of the proceeds of the recovery."—*Per* GILDERSLEEVE, J.

See further, for decisions in other states, the note to *Willison v. Smith* (1892), 52 Mo. App. 133, *infra*.

fer. Suppose after the trial of this action the assignor had commenced an action. The defendant by proving the making and delivery of the assignment to the plaintiff, could have defeated the action on the ground that he was not the party in interest, and I apprehend he would not have been permitted to show that the transfer was not as between them an actual *bona fide* sale, and the result might be that, although the defendant justly owed the debt, it would avoid liability because no one had a right to prosecute. The code never anticipated such a result.

The remaining question is whether there was a sufficient exception. The plaintiff's counsel requested the court to direct a verdict for the plaintiff, which was refused, and an exception taken. The learned judge in effect acquiesced in the request, except as to the right of the plaintiff to maintain the action. He stated to the jury "that the only real issue which appears to be raised by the pleadings and the proof is whether this plaintiff is the real party in interest." And assuming, as we must for the purposes of that question, that the court was right on the general merits, the exception to the refusal to direct a verdict presented this point only, and was sufficient. Under the charge as made, the exception, although not quite orderly in form, was pointed only to the right of the plaintiff to maintain the action. We do not intend to express any opinion upon the merits of the case, or upon any question relating to the merits. There may be a good defence to the action, but from the facts appearing on this trial, a defence can not be sustained on the ground that the plaintiff is not the real party in interest.

The judgment must be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

HAYS v. HATHORN ET AL.

COURT OF APPEALS OF NEW YORK, OCTOBER, 1, 1878.

[74 N. Y. 486.]

Appeal from judgment of the General Term of the Supreme Court, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury. (Reported below, 10 Hun, 511.)

This action was upon a promissory note, alleged in the complaint to have been made by the firm of Hathorn & Southgate, payable to the order of defendant Frank H. Hathorn, and by him indorsed and transferred to plaintiff.

The facts appear sufficiently in the opinion.

Charles S. Lester, for appellants.

John R. Putnam, for respondent.¹

¹ The arguments are omitted.

HAND, J.—In their answer, the defendants denied that the note on which the action was brought was ever transferred to the plaintiff or that he was the legal owner or holder thereof. They further denied that the plaintiff was the real party in interest; alleged that the Saratoga County Bank was the real party in interest and owner and holder and should be the plaintiff and that the note was duly transferred to it instead of to the plaintiff.

Upon the trial, the plaintiff having produced the note, which was payable to the order of F. H. Hathorn and indorsed in blank by him, rested. The defendants then offered to prove that the note "was not the property of the plaintiff, that the same was never transferred to him, that he was not the real party in interest; that the note was the property of the Savings Bank, who is the real party in interest." The evidence was objected to by the plaintiff as immaterial and was excluded. This ruling I think was erroneous and renders necessary a reversal of the judgment.

Under the answer and this offer, the defendants unquestionably proposed to show substantially that the plaintiff had no title, legal or equitable, to the note and no right as owner to its possession. This might have been done by proving that he was the mere finder or the unlawful possessor, or that the right to its possession and ownership was in the bank, to whom they were liable hereon, or in some other way. This they had a right to show.

It may be that, had their offer been admitted, they would have produced in fact no evidence to sustain it or to prevent a recovery, but in considering the validity of their exception to the exclusion, we must assume that the evidence would have fully covered the propositions contained in the offer. And, as remarked in the dissenting opinion in the court below, "unless the defendants are to be precluded altogether from giving any evidence of a matter confessedly issuable, I do not see how this offer could be rejected."

The cases relied upon as justifying the exclusion of the evidence do not go that length. In *Cummings v. Morris*, 25 N. Y. 625, it was held that the maker of a note could not defeat the plaintiff, not a payee, by proof that the consideration of the transfer to him was contingent upon his collecting the note. Such plaintiff was declared to be the real party in interest on the express ground that the transfer was complete and irrevocably vested in him the title to the note. In *City Bank v. Perkins*, 29 N. Y. 554, there was no question of exclusion of evidence, but all the circumstances being proved, it was held that where the cashier of a bank holding commercial paper, pledged it "duly indorsed" to the plaintiff as security for a loan by the plaintiff to his bank, and it had been actually transmitted under his direction to the plaintiff so indorsed, it was no defence to one admitting his liability upon such paper to show lack of authority in the cashier alone to contract a loan for the bank; or the fraudulent diversion by him of the funds received

from the plaintiff on such loan. Some of the remarks in the opinion in that case, not necessary to the decision, are perhaps too broad to be entirely approved, but it is fully conceded in it that proof that the plaintiff had no right whatever to the possession but was a mere finder or had obtained it by some "positive breach of law" would be a defence.

Brown v. Penfield, 36 N. Y. 473, holds merely that proof, by the party liable on a bill, of gross inadequacy of the consideration for the transfer of such bill to the plaintiff does not impeach the validity of such transfer as to the party so liable.

In *Allen v. Brown*, 44 N. Y. 228, it was decided that, as against the plaintiff holding legal title to the claim by written assignment valid upon its face, the debtor cannot raise the question as to the consideration for such assignment or the equities between the assignor and the assignee.

In *Eaton v. Alger*, 47 N. Y. 345, the note being payable to bearer and produced by the plaintiff upon the trial, it was proved that the payee had delivered it to the plaintiff upon his undertaking to collect it at his own expense and pay to such payee upon its collection a certain sum of money. This was held to show sufficiently that the plaintiff and not the payee was the real party in interest under the Code.

Sheridan v. The Mayor, 68 N. Y. 30, reiterates the doctrine, that, as against the debtor, the plaintiff holding a written assignment of the claim to himself, valid on its face, obtained the legal title and was the real party in interest notwithstanding the fact that the assignment was without consideration and merely colorable as between him and the original claimant. Such assignment is expressly declared to protect the debtor paying the assignee against a subsequent suit by the assignor.

In *Gage v. Kendall*, [1836] 15 Wend. 640, the fact that the prosecution of the note was *by its owner and holder* in the name of the plaintiff, a stranger to it, without his consent or knowledge, was sought to be set up as a defence, but it was ruled out on the ground that the nominal plaintiff need have no title to or interest in the paper sued upon. We apprehend the Code has changed this and that such facts would now be fatal to an action. Such a plaintiff could not in any view be the real party in interest. Indeed he would not even have manual possession of the paper.

From this glance at the cases, it appears that it is ordinarily no defence to the party sued upon commercial paper, to show that the transfer under which the plaintiff holds it is without consideration or subject to equities between him and his assignor, or colorable and merely for the purpose of collection, or to secure such a debt contracted by an agent without sufficient authority. It is sufficient to make the plaintiff the real party in interest, if he have the legal title either by written transfer or delivery, whatever may be the equities between him and his assignor. But to be entitled to sue, he must now have the

right of possession and ordinarily be the legal owner. Such ownership must be as equitable trustee, it may have been acquired without adequate consideration, but must be sufficient to protect the defendant upon a recovery against him from a subsequent action by the assignor.

As we understand the scope of the offer in the present case, it went to entirely disprove any ownership or interest whatever, or even right to possession as owner in the plaintiff. It should therefore have been admitted. It may be true that the plaintiff, if this note had been delivered to him with the intent to transfer title, might have lawfully overwritten the blank indorsement with a transfer to himself; it is also true that the production of the paper by him was *prima facie* evidence that it had been delivered to him by the payee and that he had title to it, but the defendant's offer was precisely to rebut this very presumption, and for ought that we can know the evidence under it would have done so.

The judgment must be reversed, and a new trial ordered, costs to abide the event.

All concur, except MILLER and EARL, JJ., absent.

Judgment reversed.

NICHOLS v. GROSS.

SUPREME COURT OF OHIO, DECEMBER TERM, 1875.

[26 O. S. 425.]

Motion for leave to file a petition in error to the District Court of Auglaize county.

James Murray, for the motion.

L. C. Sawyer, contra.

BY THE COURT.—The action below was brought by Gross against Nichols, upon a promissory note made payable to the order of Vance, Bro. & Co. In his petition, Gross alleged that the note was "transferred to him by delivery for collection," and that he was "the owner and holder of said note for said purpose." The note, a copy of which is attached to the petition, contains but two indorsements. One of these is a blank indorsement by the payees, and the other an indorsement by the Farmers' Bank of Findley, to the U. S. Express Co., "for collection." The only question presented is, whether this petition shows such a right in Gross as enabled him to bring the action in his own name. We are unanimous in the opinion that it does not, and that in holding otherwise the courts below were in error. The note was payable *to order*, and there is no indorsement of it to Gross. He, therefore, had neither the legal nor equitable title to the note.

*Judgments reversed, and judgment for plaintiff in error.*¹

¹ Accord: *Swift v. Ellsworth* (1858), 10 Ind. 205; *Pixley v. Van Nostern* (1884), 100 Ind. 34;

WHITE, BONNER & WRIGHT v. STANLEY.

SUPREME COURT OF OHIO, DECEMBER TERM, 1876.

[29 O. S. 423.]

Motion for leave to file a petition in error to the District Court of Hamilton county.

The original action was brought in the Court of Common Pleas of Hamilton County, by I. H. Stanley, defendant in error, against White, Bonner & Wright, plaintiffs in error, as makers, and against Sperry, Hale & Co., as indorsers, of a promissory note, of which the following is a copy :

\$1,500.

Guyandotte, W. Va., November 20, 1873.

"Eight months after date, we promise to pay to the order of Sperry, Hale & Co., fifteen hundred dollars, at Second National Bank, Ironton, O.

"WHITE, BONNER & WRIGHT."

The indorsement thereon was as follows :

"Pay I. H. Stanley.

"SPERRY, HALE & CO."

The indorsement was not to "I. H. Stanley, Cashier," as assumed by counsel.

The makers of the note, in their answer and upon the trial, sought to impeach the plaintiff's title to the note, and to establish fraud on the part of Sperry, Hale & Co., in its procurement. On the trial in the common pleas, verdict and judgment were rendered in favor of the plaintiff; the judgment was affirmed in the district court.¹

The facts of the case may be thus stated: The International Bank of Cuyahoga Falls, an unincorporated banking company, doing business in Summit county, Ohio, of which the plaintiff was cashier, held a note on Sperry, Hale & Co. for \$1,550, bearing date August 30, 1873, and payable four months after date. For the purpose of paying this note, Sperry, Hale & Co., on the 17th of December, 1873, indorsed and delivered the note sued on to plaintiff. Upon receiving this note, with special indorsement thereon, together with a bill of exchange for the difference, the plaintiff, as cashier of the bank, canceled and delivered up to Sperry, Hale & Co. their note for \$1,550. Afterward, upon the maturity of the note in suit, it was duly protested for non-payment; and thereupon the bank, through its president, in writing but without con-

Bostwick v. Bryant (1887), 113 Ind. 448, 459; *Deuel v. Newlin* (1891), 131 Ind. 40; *Abrams v. Cureton* (1876), 74 N. C. 523. And compare *Board of Commissioners v. Jameson* (1882), 86 Ind. 154, 163. On the general question, see *infra*.

Contra: Minnesota Thresher Mfg. Co. v. Heiplev (1892), 49 Minn. 395; *Lehman v. Press* (1898), 106 Iowa, 389.

¹ A part of the reporter's statement, referring to a question in attachment, is omitted.

sideration, assigned to the plaintiff all its right, title, and interest in the note; and afterward, to-wit, July 23, 1874, the original suit was commenced.

On the trial, the defendants offered the deposition of the plaintiff, wherein he testified that at the commencement of the suit he was the owner of the note, but disclaiming any personal interest therein, he further testified that, as cashier of the bank, he had, in the usual course of business, discounted the note for the bank, and that the subsequent assignment to him was for the purpose of the action only.

Testimony was also offered tending to prove (and for the purpose of this suit in fact showing) that the consideration of the note had, in part, failed, and also that the note had been procured by Sperry, Hale & Co. through fraud. But no testimony was offered tending to prove (nor is it claimed) that the plaintiff or the bank had notice of such defences at the time of the indorsement and transfer of the note.

Hildebrant & Bruner, for the motion.

Hoadly, Johnston & Colston, contra.¹

MCLVAINE, J.—Was the verdict contrary to the law and the evidence?

This general question involves two others: 1. Did the plaintiff have such interest in the cause of action as to authorize a judgment in his favor? 2. Were the makers of the note entitled to the same defences as if the action had been brought by the payees, Sperry, Hale & Co.?

1. It is not disputed that the note sued on, under the 1st section of the act of February, 1820, entitled "an act making certain instruments of writing negotiable," was negotiable by indorsement thereon so as absolutely to transfer and vest the property thereof in the indorsee; nor is it disputed that, under the 2d section of said act, the plaintiff, as indorsee, was expressly authorized to maintain an action thereon in his own name. The claim made by plaintiff in error is, that by section 25 of the code of civil procedure, passed in 1853, the plaintiff, under the facts of this case, could not maintain an action on the note. This section provides that, "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section twenty-seven." Section 27 provides that "an executor, administrator, guardian, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted." The point is, that the International Bank was the real party in interest and that the plaintiff below was not within any of the exceptions named in section 27 of the code.

If the rule of the code, when applied to the facts of this case, is in conflict with the provisions of the 2d section of the negotiable instrument act, the former must prevail; but we think there is no such conflict,

¹ The arguments are omitted.

because, not merely that the indorsee of a negotiable instrument is expressly authorized by the latter act to sue in his own name, but also that the rule of the code, without that special exception in section 27, does not forbid the action in plaintiff's name.

Whatever the rule may be in a case where an indorsement of a negotiable instrument is made for the mere purpose of collection, it is quite clear that this is a very different case. Here the payees, who were the absolute owners of the note, transferred to the plaintiff, by the indorsement and delivery, all their title and interest, legal and equitable. So that the property in the note was absolute in the indorsee, notwithstanding he might in equity have been accountable to the bank for its proceeds when collected.

But if it be conceded that an equitable interest in the note accrued to the bank by the indorsement and delivery to Stanley, then such interest was assigned by the bank to the plaintiff before suit was brought. So that if the plaintiff was not the absolute owner of the note, he must have held it under some agreement or understanding with the bank as trustee of an express trust, for the benefit of the bank. In which case he came within another exception to the rule of section 25 of the code as contained in section 27.¹

The fact that the bank assigned and transferred its equitable interest in the note, if it had any, to the plaintiff without consideration and for the purpose of enabling him to prosecute the suit in his own name, does not in the slightest degree affect the question now under consideration, to wit, the right of the plaintiff to prosecute the suit in his own name.

2. Having determined that the action below was properly prosecuted in the name of the indorsee, the next question is of easy solution.

The plaintiff acquired the note in controversy before maturity, in good faith, and for a valuable consideration. There is no pretense that he had notice at that time of any infirmity in the note as between the original parties. And conceding that the plaintiff took the note in trust for the benefit of the bank, and that therefore any defence which the makers had against the payees, of which the bank had notice, would be available against it in the hands of the plaintiff, the case is still against the plaintiffs in error. It is affirmatively shown that the bank had no knowledge of the alleged defences against the note.

We find no error in the record.

*Motion overruled.*²

¹ See *infra*; and compare *Holmes v. Boyd, Cashier* (1883), 90 Ind. 332.

² A part of the opinion, relating to a question in attachment, is omitted.

BELL, v. TILDEN.

SUPREME COURT OF NEW YORK, GENERAL TERM, DECEMBER, 1878.

[16 Hun, 346.]

Appeal from a judgment in favor of the plaintiffs, entered upon a verdict directed by the court. The action was brought to recover \$3,000 in gold coin on the acceptance by the defendant of a bill of exchange, drawn payable to the order of the drawer thereof and indorsed by him.

Alexander Ostrander and Gilbert O. Hulse, for the appellant.

Redfield & Hill, for the respondents.

DAVIS, P. J.—On the trial the plaintiffs produced a bill of exchange described in the complaint, and proved the indorsement thereof, made by the payee in blank, and after reading the same in evidence rested. This possession and production was *prima facie* evidence of ownership in the plaintiffs. The motion to dismiss the complaint on the ground that the plaintiffs had not shown that they were the real parties in interest and *bona fide* holders was properly denied.

The defendant then called one of the plaintiffs, and proved by him that the plaintiffs were agents of the Bank of Montreal, in Canada, and that the draft was sent to plaintiffs by the Bank of Montreal, with instructions to put it in suit against the defendant, and for that special purpose, and the plaintiffs put it into the hands of their attorneys for the purpose of being sued. The following question was then asked: "Have you or your partner any interest in the proceeds of that draft?" This question was objected to as immaterial. The objection was sustained, and the defendant duly excepted. Several questions of like import were asked, objected to, and excluded, and exceptions taken. No further evidence was given tending to show any ownership or interest in the plaintiffs in the bill of exchange. At the close of their testimony the defendant's counsel again moved to dismiss the complaint, on the ground that mere naked agents, as plaintiffs are proved to be, cannot, not being the parties in interest, sue on such an obligation. The court denied the motion, and defendants duly excepted. The evidence showed clearly that the plaintiffs were mere naked agents of the Bank of Montreal, having, in fact, no legal title to the paper in suit, and no interest whatever therein.

The presumptions arising from possession of the paper were completely rebutted and overthrown, when it appeared affirmatively that the instrument was not indorsed to the plaintiffs but the Bank of Montreal, and that the plaintiffs came into the possession thereof, as agents of the bank, without any interest in the paper, with instructions to put it in suit against the defendant, and for that special purpose. This state of facts distinguishes the case from all those cited by the learned counsel for the respondent. In each of the cases cited, with

possibly the exception of *Hays v. Southgate*, 10 Hun, 511, it distinctly appeared that the legal title was in the plaintiffs; and the case of *Hays v. Southgate* is distinguishable from this by the fact that in this case it affirmatively appeared that the possession of the plaintiffs was that of a naked agent. The possession of an agent is the possession of the principal, and, of itself, carries no legal title to the agent. The Code declares that every action must be prosecuted in the name of the real party in interest. Code, § 111. It was subsequently held in *Sanford v. Sanford*, 45 N. Y. 723, that this section of the Code was not altogether abrogated by judicial repeal; and the criticism of Peckham, J., upon the cases referred to, seems to have been adopted by the court.

The general rule before the Code was that actions could not be maintained in the name of mere agents.¹ To enable an agent to maintain an action in his own name, there must be something more than the mere powers of a naked agent. It was clearly shown in this case that the plaintiffs had nothing but such powers.

To sustain the ruling in this case, would be to hold that all foreign corporations may maintain actions in this state in the name of mere naked agents, and thus evade the provisions of our statute requiring bonds for costs to be given by such foreign corporations; and indeed it would allow all actions upon negotiable contract to be brought in the names of simple collecting agents.

The judgment should be reversed, new trial granted, with costs to abide the event.

INGALLS, P. J., concurred.

Present—DAVIS, P. J., BRADY and INGALLS, JJ.

*Judgment reversed, new trial ordered, costs to abide event.*²

¹ *Citing*, Harp v. Osgood, 2 Hill, 216; Taintor v. Prendergast, 3 Hill, 72; Paley on Agency, chaps. 4, 5.

² See also, *Iselin v. Rowlands* (1883), 30 Hun, 488, 489, where LEARNED, P. J., delivering the opinion of the Supreme Court in General Term, says:

"One difficulty meets us at the outset. The plaintiffs allege that they are the lawful holders and owners of the drafts, and that the amount thereof is due from defendant to them. The defendant denies this and alleges that the drafts were only delivered to the plaintiffs for presentation, and that they are not the owners or holders.

"The plaintiffs by their own letters say that they are the agents of the Comptoir d'Escompte for collecting the drafts. The referee finds, as a matter of fact, that the indorsements of the drafts and their delivery to plaintiffs were for the special purpose of collection. But on this the referee held that the plaintiffs became holders and owners of the drafts, and as trustees of an express trust, were entitled to maintain the action.

"There is no doubt that proof of the indorsement to the plaintiffs was *prima facie* evidence that they were owners. But that was contradicted by the other proof on which the referee found, as the fact plainly was, that such indorsement and delivery were for the special purposes of collection, and by the plaintiffs' own statement that they were agents for the Comptoir d'Escompte. The fact also that the plaintiffs, on being informed by the defendant of the compromise with Badollet & Co., made no objection and asserted no rights, as owners, to the drafts, is further evidence, if any were needed, that they were in possession of the drafts only as agents, if not for Badollet & Co., at least for the Comptoir d'Escompte.

"We have then the question *whether one who is only an agent for collection, and has possession of commercial paper only in that capacity*, can sue thereon in his own name. It seems hardly necessary to quote section 449 of the Code, identical in part with section 111 of

the old Code, that every action must be prosecuted in the name of the real party in interest. This has now been the law for many years. Before the passage of the old Code the rule was different. And often it was necessary that an action should be prosecuted by one who was not the real party in interest, as for instance, in the case of assignments of contracts other than commercial paper. Hence, decisions prior to the adoption of the Code are often inapplicable. And even in earlier decisions under the Code, the new doctrine was hardly accepted in its full force. But recent decisions are conclusive against the plaintiffs. *Bell v. Tilden*, 16 Hun, 346, is almost exactly like the present case. *Hays v. Hathorn*, 74 N. Y. 486, is to the same effect. The case of *Westmore v. Hegeman*, 88 N. Y. 69, cited by plaintiffs, was one where the assignment of the cause of action to the plaintiff was in trust for certain purposes so as to give him an interest therein. And it does not affect a case like this, where there was no assignment to the plaintiffs and no interest given to them in the subject-matter; but where they were mere agents of other persons with no interest themselves.

"Nor were the plaintiffs trustees of an express trust. The plaintiffs cite *Considerant v. Brisbane*, 22 N. Y. 389 [given in the text, *infra*], decided by a bare majority. But in that case the contract was, by its terms, payable to the plaintiff, described therein as agent. So again, the plaintiffs cite *Devol v. Barnes*, 7 Hun, 342. There, too, the plaintiff undertook to collect certain claims as his own and acquired an interest therein. But in the present case we have the case of plaintiffs who were mere agents for collection. If they are agents, then their principals are the owners.

"The judgment should be reversed and a new trial granted, costs to abide the event, referee discharged."

BOARDMAN and BOCKES, JJ., concurred.

See also, *Bostwick v. Bryant* (1887), 113 Ind. 448, 459.

Compare, however, *Zimmer v. Chew* (1898), 34 App. Div. 504, 508: "The indorsement of the note in blank by the payee Dalzell and the production of it by the plaintiff constituted *prima facie* evidence of the latter's ownership. 4 Am. & Eng. Ency. of Law, 2 ed. 318, and cases cited. The mere fact of subsequent indorsements does not affect the result. Presumably the prior holder, the plaintiff, took up the note. That view is strengthened here by the cancellation of the later indorsements. To rebut this presumption of ownership, the defendants rely mainly upon the plaintiff's cross-examination. From this it appears that, three days before the note was made, Dalzell gave the plaintiff power of attorney to collect and receive all moneys payable to him, and that the plaintiff received the note for Dalzell, and acknowledged payment of a part of it. But this does not necessarily rebut the legal presumption of ownership. It is entirely compatible with such ownership. The case is quite different from those cited, *Iselin v. Rowlands*, 30 Hun, 485, *Bell v. Tilden*, 16 Hun, 346, where there was explicit and uncontradicted evidence that the plaintiff was a mere collection agent."—*Per* BARRETT, J.

VIMONT v. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

SUPREME COURT OF IOWA, JUNE TERM, 1886.

[69 *Iowa*, 296, 299.]¹

BECK, J.—A rehearing was allowed in this case upon the petition of defendant. . .

In addition to the question expressly determined in the foregoing opinion, upon which we have no occasion to say more, and with the disposition whereof we remain well satisfied, other questions urged upon the rehearing seem to demand further brief attention. These questions arise upon defendant's answer, a demurrer to which was sustained, pleading, substantially, these defences: (1) The assignment of the claim to plaintiff was "collusive, colorable and fraudulent," in that it was made to deprive defendant of the right to a removal of the cause to the federal courts, and the assignor is the real party in interest, and it is to receive the entire benefit of the claim. (2) The assignment is champertous, and is "unlawful maintenance." . . .²

The first defence above specified may be disposed of upon the following considerations: If the assignment was lawful to defeat the transfer to the federal court, though made for that purpose, it can not be alleged that it was "collusive, colorable and fraudulent," because of that motive. The law, recognizing it as lawful notwithstanding the motive that prompted it, will not pronounce it void by reason of the existence of that motive. It is settled by the decisions of the United States Supreme Court and this court that a transfer to the United States court can not be made on the ground that the motive of the assignment was to defeat the transfer.³

In this case the assignment was sufficient to pass to plaintiff the legal title to the claim. He is vested with property therein, and, by virtue of that property right, clothed with authority to maintain an action upon the claim.

It is not alleged that the assignment is "collusive, colorable and fraudulent" for any reason other than the purpose to prevent the removal of the action brought upon the claim to the federal court. The plaintiff is the real party in interest, required by the statute to bring suit on the claim. Defendants have no ground of complaint against the assignment, except that it defeats their right of removal, which the courts hold it lawfully does. Now, if the defence under

¹ Only the opinion on rehearing is given here. The opinion on the original hearing, which turned wholly upon a question of the assignability of a claim for personal injury sustained by plaintiff's assignor through the alleged negligence of the defendant, is given p. 470 *ante*.

² Part of the opinion is omitted.

³ *Citing*, *Provident Sav. Life Assur. Soc. v. Ford*, 114 U. S. 635; s. c. 5 Sup. Ct. Rep. 1104; *Vimont v. Chicago & N. W. Ry. Co.* 64 *Iowa*, 513.

consideration is sufficient to defeat the action, the plaintiff can not have a remedy at all by suit. The assignment would be as nothing, and any action on the claim must be brought by the assignor in the United States court, or, if brought in the state court, it would be transferred to the federal court. The law never does by indirection what it will not do directly. It declares that the motive of the assignment is not sufficient to give the federal court jurisdiction, in a direct application made for a transfer. In an indirect manner, such jurisdiction is not conferred on the ground of the motive of the assignment. The defendant, as has been said, claims on no other grounds than that plaintiff is not the real party in interest, or that for any other reason than that the motive of the assignment was to defeat a transfer, it was void and fraudulent.

Counsel for defendant, upon the rehearing, again argue the proposition that the assignment under which plaintiff prosecutes this action is void by reason of the fact that it is *champertous*. They insist that this objection is not disposed of by *Vimont v. Chicago & N. W. Ry. Co.*, 64 Iowa, 513, cited in the foregoing opinion as having that effect.

The questions for our consideration arose upon demurrer to defendant's answer. To attain a proper understanding of the precise question presented by the record, it becomes necessary to state more particularly the pleadings in the case. The petition sets out the assignment of the claim to plaintiff, which is in writing. It is signed by the assignor alone, and purports to be "for value received," and contains no contract, covenant, or expressed obligation binding the assignee. There is nothing in it upon which the charge of champerty can be based. It is simply, in effect, an assignment of the claim, and nothing more. The defence of champerty is pleaded in the fourth count of the answer, which is in the following language:

For further defence herein defendant says that said alleged assignment was executed, delivered, and accepted by plaintiff, and its acceptance took effect, in the state of Illinois; and that at the time of the delivery and acceptance thereof by plaintiff, and as a part of the same transaction, the plaintiff executed and delivered to said Darby Carr an agreement in writing, in words and figures as follows, to wit:

"In consideration of the assignment to me by Darby Carr of his claim for damages against the Chicago & Northwestern Railway Co. [describing it], I hereby agree to dispose of the entire amount realized on said claim as follows: For my own compensation in and about the prosecution of said claim, and for the use of any advance of money I may make, I am to retain thereof the sum of fifty dollars. I am also to retain all sums of money that I may advance in the prosecution of said claim. Next, I agree to pay out of the proceeds of such recovery the reasonable fee of the attorneys and agents employed to prosecute said claim, or such fee therefor as may be agreed upon, if an agreement for a specific amount be agreed upon, and the balance of said recovery I agree to pay to said Darby Carr.

(Signed) "W.M. H. VIMONT."

That said assignment and agreement is barratrous and champertous, and unlawful maintenance, and is illegal and void, both in the state of Illinois and Iowa; and that plaintiff has no right or cause of action thereunder, enforceable in this state or elsewhere.

It clearly appears from the pleadings that the transaction is evidenced by two distinct and independent writings, the *first*, an assignment of the claim, showing nothing to support the charge of champerty; the *second*, a unilateral contract in the nature of a declaration of trust, binding plaintiff to dispose of the proceeds of the claim, when collected, in the manner therein prescribed. In my opinion, the first instrument can not be held invalid and incapable of enforcement by reason of any provision, illegal or otherwise, found in the second, which would be alone affected by any source of infirmity found in it. The contracts are independent, though the covenants of one may be regarded as the consideration of the other. Vimont could not plead the invalidity of the last contract on the ground of its champertous character, should he be sued on the second for a failure to collect the claim. Neither could he set up a like defence to an action against him to enforce the appropriation of the funds as prescribed by the second, on the ground that it is champertous. The assignor, Carr, could not plead champerty against the enforcement of the first instrument, for it is not champertous in character, and contains no provision setting out, or in any manner evidencing, an unlawful contract. Whether he could defeat the provisions of the second instrument because it is champertous I need not inquire in order to support the view just presented. I conclude, therefore, that the assignment does not present a champertous contract.

I am also of the opinion that the second instrument, in its conditions and terms, does not embody a champertous contract. The conditions for the payment of attorneys and agents employed about the prosecution of the suit, and \$50.00 compensation to plaintiff, are not champertous. The condition authorizing plaintiff to retain sums of money advanced by him in the prosecution of the claim is not champertous, for the reason that plaintiff does not undertake or obligate himself to make any such advances. It is not an agreement to maintain or support a lawsuit. Plaintiff is not bound thereby to furnish or supply money for the prosecution of an action. It is not, therefore, champertous.

But if it be assumed that the terms of the instrument signed by plaintiff are champertous, a majority of the court are united in the opinion that a defence based upon that ground can not be pleaded in this case. It is a matter that can be pleaded only in an action between the parties to the contract, and, if not pleaded therein, the contract may be enforced as valid between them. If the party wronged by the champertous contract fails to plead the illegality as a defence, the

contract may be enforced against him. The interest or rights of a stranger not being affected, he can not set up champerty to invalidate the contract. The defence pertains to the contract itself, and can only be pleaded in an action between the parties to it.¹

We adhere to the conclusion announced in the former opinion filed in the case.²

Affirmed.

¹ *Citing*, Knadler v. Sharp, 36 Iowa, 232; Hyatt v. Burlington, C. R. & N. R. Co. 63 Iowa, 662.

² To this, two of the five judges on the Supreme Bench dissented as follows: ADAMS, J., *dissenting*. For the purpose of this opinion it may be conceded that, if Vimont holds the legal title to the claim, he is sufficiently a party in interest to enable him to maintain this action. But in my opinion he can not, under the averments of the answer demurred to, be regarded as holding the legal title. The court, in adjudging that he does hold such title, must sustain the contract of assignment. This it can not do if the contract is champertous, for, in such case, it is against public policy, illegal and void.

The writer of the majority opinion holds that the contract is not champertous, and we have to consider whether this holding is correct. It is true, the paper signed by Carr does not show what the consideration of the assignment was. The champertous character of the transaction appears alone from the papers signed by Vimont. But the two papers are to be taken together. Not only does Vimont's agreement expressly recite that it is made "in consideration of the assignment," but the answer expressly avers that, "as a part of the same transaction, the plaintiff executed and delivered to said Darby Carr an agreement in writing, in the words and figures as follows, to wit." Then follows a copy of Vimont's agreement. This averment that the agreement is a part of the same transaction is admitted by the demurrer. Now, how in the face of this fact the writer can properly say that the two papers are independent of each other, and treat them so, I am unable to see. The holding seems to me to be in express contravention of what is admitted of record.

But it is said, substantially, that in no view is the transaction champertous, because Vimont did not agree to prosecute the action, nor to pay, or become responsible for the costs. It may be admitted that the paper signed by Vimont was very ingeniously drawn, but no one can read it, and have the slightest doubt that he took the claim in trust for Carr, to prosecute at his own expense, for the chance of making a net profit of \$50. No other possible object of the assignment than the prosecution of the claim by Vimont in his own name has been suggested, nor is it possible to discover any.

But, aside from what is the manifest construction of the contract, there is the controlling fact that the case is, in fact, being prosecuted by Vimont in his own name, and he has paid, or is responsible for, the costs; and this is being done under the contract which gives him a net profit of \$50 in case of success, and nothing more. Now, the question is simply this: Where an action is being prosecuted under such a contract, is the contract champertous? That such a contract constitutes the ordinary case of champerty it seems to me that there can be no doubt. In Bouvier's Law Dictionary "champerty" is defined as "a bargain with the plaintiff or defendant to divide the land or other matter sued for between them, if they prevail at law; the champertor undertaking to carry on a suit at his own expense." Have not Vimont and Carr agreed to divide the proceeds of the claim if they shall prevail at law and is not Vimont responsible for costs, and so carrying on the suit at his own expense, so far as the case shows? There can be but one answer.

But it is said that champerty can be pleaded only by a party to the champertous contracts. But this, I think, can not be so when it is set up merely to invalidate the plaintiff's title to the claim sued on. The case is not different in principle from what it would be if the defendant had pleaded that the assignment is forged. If the plaintiff had admitted by demurrer that it was forged, would any one claim that he could recover? But a contract which is illegal is just as essentially void as if it were forged. It is not good for any purpose whatever, and must be condemned, and held as naught as soon as its illegal character is admitted or otherwise shown. The defendant does not set up the void character of the contract as showing that it is not liable, but as showing that it is not liable to the plaintiff; and this, I think, it may do, if a defendant can ever show that the plaintiff is not the real party in interest.

ROTHROCK, J., concurs in this dissent.

HOAGLAND v. VAN ETTEN.

SUPREME COURT OF NEBRASKA, JANUARY TERM, 1888.

[22 Neb. 681.]

Appeal from the district court of Douglas County.

David Van Etten, for appellant.

Warren Switzler, for appellee George A. Hoagland.

MAXWELL, CH. J.—This is an action to foreclose a mechanic's lien upon certain real estate described in the petition, owned by Mrs. Van Etten. Moyer claims for material furnished to one Hayden, a contractor, in the erection of the defendant Van Etten's dwelling, and French is a senior mortgagee. The amount claimed to be due the plaintiff for material furnished by him is the sum of \$803.76, with interest. He also claims there is due him the sum of \$17.07 upon the account of one Andrew L. Wiggins, and the sum of \$18.87 on the account of Harvey S. Nutting. He further claims to be due him the sum of \$86.00 on the account of Ruton Gsanter & Co., and on the account of Nich. Spellman the sum of \$72.00, and \$24.00 on the account of one Wm. Klatt; \$13.87 on the account of Hans Tams; \$28.82 on the account of Jacob New; \$30.05 on the account of Sullivan Bros.; \$163.12 on the account of Sidney D. Crawford; \$40.87 on the account of John Liibbe; \$48.00 on the account of Abner C. Smiley; \$21.41 on the account of N. J. Sander; \$58.83 on the account of James Morton & Son; \$213.00 on the account of Henry A. Kusters. The plaintiff also alleges

"that he owns the above claims against said last-named defendant, and they are all past due, and demand has been made on the said defendant for payment, and payment thereof was refused and no part of any of said claims has been paid."

The defendant in her answer denies that the plaintiff owns the claims above set forth, and alleges that the plaintiff is not the real party in interest. On the trial the court instructed the jury: "It will not be necessary for you to determine whether the assignment was valid or not; but you will allow the amount due, if anything, on each particular claim the same as if sued on by the original party, and subject to the same defences, if any, regardless of the alleged assignment."

It is conceded that the assignments were merely formal, to enable the plaintiff to bring the action for all, and that he is not the real party in interest. In justification of this course, the plaintiff's attorney cites Pomeroy on Remedial Rights and Remedies, section 132. In all the cases cited by Mr. Pomeroy in support of his proposition, except two, the plaintiff has an interest in the proceeds resulting from the suit. It was not a case of an entire want of interest, but merely a defect of

parties plaintiff. In such case it is well known that if one of the proper parties brings an action and no objection is made for defect of parties, he may maintain the action although others should be brought in, as where a debt is assigned as collateral security for a less sum than the value of the debt, the assignee may maintain an action on the security although the assignor having an interest in the surplus would be a proper party.

Section 29 of the code provides that, "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 32."

In *Mills v. Murray*, 1 Neb., 327, it was held that the assignee or actual owner of a chose in action is the proper and only party who can maintain a suit thereon. This doctrine was affirmed in *Seymour v. Street*, 5 Neb., 93, *Hickland v. Nebraska City National Bank*, 8 Neb., 463. The language of the statute is plain and unambiguous, "Every action *must* be prosecuted in the name of the real party in interest, except," etc. This case is not within any of the exceptions named, and therefore must be considered with reference solely to section 29. If a party having no interest in the subject-matter of the suit, who holds simply as assignee, and is to deliver to his assignor the proceeds of the action, may maintain an action on such an assignment, then section 29 has no meaning whatever. We do not care to enter into a discussion of the propriety, or impropriety, of requiring actions to be brought in the name of the real party in interest. The statute contains a plain provision which this court has no authority to disregard. We hold, therefore, that an assignee having no interest in the result of the suit, and not entitled to any portion of the proceeds thereof, is not entitled under section 29 to maintain an action as the real party in interest. Where a number of persons hold mechanics' liens against certain real estate, such persons may and should be brought before the court, as among such lienholders there is no priority, but each lien should stand upon its own separate facts, in order that issue may be taken thereon.¹

Reversed and remanded.

¹ Only so much of the opinion is given as relates to this one point.

HOAGLAND v. VAN ETEN.

SUPREME COURT OF NEBRASKA, JANUARY TERM, 1888.

[23 *Neb.* 462.]Motion for rehearing of case reported 22 *Neb.*, 681.*Warren Switzler*, for the motion.

MAXWELL, J.—The plaintiff has filed a motion for rehearing, upon the ground, first, that the plaintiff can maintain the action upon the claims assigned to him, although he is not the actual owner thereof, but merely holds the legal title; and it is claimed that if the assignment should be held to be void, the mechanic's lien would thereby be divested and such claims lost. It is alleged that section 29 of the code is complied with if the plaintiff has a mere naked assignment of the claim, although he is not the party beneficially interested. To this we can not give our assent. At common law an action was required to be brought by a party to the contract, even though he had parted with his entire interest in it by assignment. Courts of equity, however, not only recognize the right of the assignee to bring the action, but absolutely required him to do so. If the assignee was but a nominal owner he could not sue, but the action must be brought by the real party in interest.¹

An exception was made where the assignee held a nominal interest as trustee, Story's Eq. Pl. 115n. It is unnecessary in this connection to notice the exceptions to the general rule above stated, as in the case of executors and administrators, trustees of an express trust, and persons expressly authorized by statute to sue without joining the person for whose benefit the action is brought; but with these exceptions the rule, that every action must be prosecuted in the name of the real party in interest, is but a statutory enactment of the rule respecting parties which has always prevailed in courts of equity, and which such courts deemed best adapted to advance the ends of justice.²

The framers of the code, therefore, having adopted the equity rule as to the party plaintiff, thereby required the action to be brought in the name of the real party in interest—the party entitled to the fruits of the action, the beneficial claimant. The rule contended for by the plaintiff would have the effect to expunge section 29 of the code from the statute. We adhere to our former decision, that the action must be brought in the name of the real party in interest.

It is apparent, however, that if the action as to the assigned claims

¹ *Citing*, *Rogers v. Traders Ins. Co.*, 6 Paige Ch., 583; *Field v. Maghee*, 5 Id. 539; 1 *Van Santvoord's Eq. Pr.* 72.

² *Citing*, *Grinnell v. Schmidt*, 2 Sandf. 706; *Hollenbeck v. Van Valkenburg*, 5 How. Pr. 284; *Wallace v. Eaton*, 5 How. Pr. 100; *Brownson v. Gifford*, 8 How. Pr. 395; *Report of Com.*, pp. 123, 124.

is dismissed and the plaintiff required to make the owners of such claims defendants, that the lien of such claims would thereby be lost, as the action would not be brought within the time required by the statute. To preserve such liens, therefore, being in furtherance of justice, the plaintiff will be permitted within thirty days from this date to acquire all the interest of his assignors in said claims, thereby joining the legal and equitable rights of said assignors and making the plaintiff the absolute owner of all their rights in the premises, the amendment when made to take effect from the bringing of the action. The plaintiff, as a condition of making such amendment, to pay all costs which have accrued in court by reason of said assigned claims.¹

Motion denied.

¹ Part of the opinion, touching on another question, is omitted.

The petition in *Hoagland v. Van Etten* (1888), 23 Neb. 462, was amended as suggested in the opinion given above, and in 1891 the case came again before the Supreme Court, on appeal, in *Hoagland v. Van Etten*, 31 Neb. 292. Said the court, per MAXWELL, J.: "One of the principal points relied upon by the defendant is in permitting the plaintiff to acquire the equitable as well as the legal title to the claims assigned to him. This objection should have been made after the modification of the judgment in the former case, and the attention of the court called to the objectionable decision then. No objection was made to that order at the time, and the plaintiff complied with it and paid a large amount of costs in compliance with its terms, and it is now too late to raise the objection. Aside from this, the order itself is right. These parties had performed labor and furnished material in the erection of a dwelling for the defendant. They had taken the necessary steps to perfect a mechanic's lien upon the property and had thereby acquired an interest therein. Many of these claims were for small amounts, which, if brought as separate actions, would have mulcted the defendant in a large amount of costs in each case, while the expenses would have practically reduced the claims to a small amount for each creditor. In the interest of economy, therefore, not only in behalf of the plaintiff, but the defendant as well, the claims were assigned to the plaintiff and he was authorized to assert not only his own rights in the premises, but the rights of other lienholders against the property. As to the other creditors, he was, in fact, a trustee, and it is possible the action might have been sustained on that ground, although that is not clear. The court, however, required him to acquire the equitable as well as the legal interest in the liens and proceed with the prosecution of the action.

"The action had already been commenced to enforce the liens, and the court required him to become the actual as well as the ostensible owner of the same.

"The mechanic's lien law is a remedial statute and is to be liberally construed in furtherance of justice." (p. 298.)

WILLISON v. SMITH.

ST. LOUIS COURT OF APPEALS, DECEMBER 27, 1892.

[52 Mo. App. 133.]

Appeal from St. Louis City Circuit Court.

Edmond A. B. Garesche, for appellant.*Robert W. Goode*, for respondent.

ROMBAUER, P. J.—The plaintiff brought an action of replevin for the possession of certain household furniture. The action was brought before a justice of the peace, and upon its trial anew in the circuit court the plaintiff was nonsuited. An inquiry of damages was thereupon had in favor of defendants, the jury assessing the value of the property at \$175, and the damages for its detention at \$76.50. Judgment was rendered accordingly. Error is assigned by the plaintiff, appealing on both branches of the case.

It appeared in evidence that, on June 24, 1890, the defendants made a negotiable promissory note for \$81.25, payable to the order of E. R. Mackey on July 24, 1890, at the office of the Missouri Mortgage Loan Company in St. Louis, and secured the note by chattel mortgage on the property in controversy. The plaintiff is an employe of the Missouri Mortgage Loan Company, and held this note for collection in August, 1891, and for some time prior thereto. The note remaining unpaid, the plaintiff instituted this suit of replevin.

The only ground on which the plaintiff could have been nonsuited was his failure to show such title to the note in himself, as would entitle him to maintain an action at law thereon in his own name. If he could maintain an action at law on the note, it necessarily results that he could maintain an action at law on the mortgage, which, under the decisions in this state, is a mere incident to the note.¹

After condition broken, the legal title to the property mortgaged is in the mortgagee²

and, in case of assignment of the mortgage debt, in the assignee.

It appeared in evidence that the plaintiff did not know E. R. Mackey, the payee, personally, and had no correspondence with him of any kind; and that this note was transmitted from St. Louis to one F. J. Mackey in Chicago, who, as far as the evidence shows, had charge of nearly all of E. R. Mackey's business consisting of claims and collections. When the note was returned to the plaintiff from Chicago, it bore an indorsement of the name of E. R. Mackey, which indorsement was written by F. J. Mackey. It also appeared that F.

¹ *Citing*, *Thayer v. Campbell*, 9 Mo. 280; *Anderson v. Baumgartner*, 27 Mo. 80; *Potter v. Stevens*, 40 Mo. 229.

² *Citing*, *Lacey v. Giboney*, 36 Mo. 320; *Johnson v. Houston*, 47 Mo. 227.

J. Mackey gave special verbal instructions to the plaintiff in regard to this note and mortgage, and its enforcement. It further appeared that, in the suit before the justice, E. R. Mackey was made a coplaintiff in this suit, and his name is signed to the recognizance of appeal as that of a principal. On the trial in the circuit court, however, his name was withdrawn as a plaintiff.

We must hold that upon this showing the plaintiff was improperly nonsuited. It has always been the law of this state that a holder of a note may maintain an action at law thereon in his own name.¹

It is immaterial whether the note is negotiable or not negotiable or whether the holder holds it for collection merely.²

As far as the evidence shows, this note never was in the possession of E. R. Mackey, except in so far as it was in the possession of his agent, F. J. Mackey. As F. J. Mackey was a resident of Chicago, if he had any authority to collect this note (which fact is not disputed), he had authority to indorse it for collection to some one in St. Louis, where the note by its terms was payable. Under the law of agency, such authority is implied under the circumstances, even though the agent has no authority to make his principal liable as an indorsee by such indorsement. *Mechem on Agency*, secs. 194, 195; *Wharton on Agency*, secs. 31, 32. Having so indorsed it, the agent in St. Louis became under all the authorities in this state a holder for collection, and could maintain an action at law on the note in his own name, and after condition broken on the mortgage, subject of course to all the equities which the payee has against the true owner. The fact that E. R. Mackey appears to be the usurer, and that the plaintiff has lent himself to the enforcement of an oppressive bargain, can not change the applicatory law.

On the second branch of the case the court committed error in instructing the jury to find damages for detention, when no such damages were shown, and in sustaining the finding of \$76.50 for such damages. As the judgment must be reversed for error on the main issue, we mention this matter merely to avoid the repetition of such errors in similar cases.

All the judges concur. *Judgment reversed and cause remanded.*

¹ *Citing*, *Boeka v. Nuella*, 28 Mo. 180; *Bennett v. Pound*, 28 Mo. 598; *Willard v. Moies*, 30 Mo. 142; *Lewis v. Bowen's Adm'r*, 29 Mo. 202; *Harvey v. Brooke*, 36 Mo. 493; *Davis v. Carson*, 69 Mo. 609.

² *Citing*, *Spears v. Bond*, 79 Mo. 467.

³ *Citing*, *Webb v. Morgan*, 14 Mo. 430; *Beattie v. Lett*, 28 Mo. 596; *Simmons v. Belt*, 35 Mo. 461; *Jefferson Savings Association v. Morrison*, 48 Mo. 273.

NOTE.—ASSIGNEES FOR COLLECTION, THE ASSIGNMENT ITSELF BEING ABSOLUTE ON ITS FACE.

Accord with the general doctrine of the text: *Guerney v. Moore* (1895), 131 Mo. 650, 668. *Meeker v. Claghorn* (1871), 44 N. Y. 349 [the assignment of an account was in writing and absolute in terms. Two of plaintiff's assignors testified on cross-examination that they "expected to receive the amount recovered in the action"]. *Curran v. Weiss* (1893), 6

Misc. 130, assignment of a claim for damage to the merchandise of plaintiff's assignor, through defendant's negligence in permitting a water-basin to overflow]. Said the court: "The legal ownership of the demand in suit having been transferred to plaintiff, he was entitled to recover, notwithstanding the fact that the assignor expected to share in the recovery."

Walcott v. Hilman (1898), 23 Misc. 459: "The justice below dismissed the complaint solely on the ground, as stated by him, 'that the assignment as sworn to by witness shows collusion with assignee, the plaintiff's assignor having testified that he expected to receive from the plaintiff the amount of any recovery that might be obtained in the action. This was error for which the judgment must be reversed. As between the assignor and the assignee, there was a legal transfer of the cause of action, and this was sufficient to make the plaintiff the real party in interest for the purpose of maintaining the action.'—*PER BEEKMAN, P. J.*

See also *Walburn v. Chenault* (1890), 43 Kan. 352, 357: "Another point is that the action is not brought by the real party in interest. The Tiernan judgment was assigned to Chenault in writing, as follows:

"This Instrument Witnesseth: That for value received I hereby assign to Waller Chenault the benefit of the judgment obtained by me in the case of Francis Tiernan v. The St. Louis, Fort Scott & Wichita Railroad Company, obtained in the district court of Bourbon County, Kansas, in October, 1885. The said judgment is for about \$19,000; and the entire judgment is assigned, subject, however, to a reservation of the unpaid attorneys' fees of E. M. Hallett and J. D. McCleverty, yet unpaid in said case.

"This September 24, 1887.

FRANCIS TIERNAN."

"An entry of the assignment was also appended to the judgment on the journals of the district court in which the judgment had been given. The consideration for the assignment was a large indebtedness of Tiernan to Chenault's Bank, or the bank of which he was president, and it was agreed that the proceeds of the judgment should be applied in payment of the indebtedness, and to the discharge of an attorney's lien which had attached to the judgment. The assignment is absolute, and is such as to vest in the assignee the whole legal title. He had such a beneficial interest in the proceeds of the judgment that he could bring an action in his own name, without joining other parties, who, by collateral agreement might be entitled to a share in the proceeds. . . . The plaintiffs in error were not limited or cut off from any defence by reason of the assignment, and the absence of parties to whom the assignee must account can not cause any future embarrassment to the plaintiffs in error."—*PER JOHNSTON, J.*

In *Knadtler v. Sharp* (1873), 36 Iowa, 232, the court remarked: "It is also provided by Revision, section 2757: 'Every action must be prosecuted in the name of the real party in interest, except as provided in the next section.' This language was first construed, as found in the code of 1851, section 1676, to mean the party having the legal title or interest. *Farwell v. Tyler*, 5 Iowa, 535. But afterward it was held to mean the party having the beneficial interest, as contradistinguished from the mere holder of the legal title. *Conyugham v. Smith*, 16 Iowa, 471. And subsequently it was held that the party holding the legal title to a note or instrument may sue on it, though he be an agent or trustee, and liable to account to another for the proceeds of the recovery, but he is open in such cases to any defence which exists against the party beneficially interested; or the party beneficially interested, though he may not have the legal title, may sue in his own name. *Cottle v. Cole*, 20 Iowa, 481. The same doctrine was again affirmed in *Rice v. Savery*, 22 Iowa, 470 [given in text *ante*, p. 243]. It follows therefore that the court did not err in holding that the plaintiff might recover upon all the claims as the proper party to the action, and that the contract of assignment to him and his agreement to pay over the net proceeds did not constitute champerty."—*PER COLE, J.*, p. 236.

In accord also are *Abell Note Co. v. Hurd* (1892), 85 Iowa, 559. *Lehman v. Press* (1898), 106 Iowa, 389, 390. (Compare *Goodnow v. Litchfield* (1884), 63 Iowa, 275, 279, where the plaintiff holds as trustee.) *McPherson v. Weston* (1883), 64 Cal. 275. *Toby v. Oregon Pacific R. R.* (1893), 98 Cal. 490: "A trustee to whom a chose in action has been transferred for collection is, in contemplation of law, so far the owner that he may sue in his own name."—*PER SEARLS, C.*, p. 497. *Tuller v. Arnold* (1893), 98 Cal. 522. [A claim upon an account for goods sold was sent to D. for collection, by a law firm in Chicago, to whom the account had been sent for collection by the vendor of the goods. The account was assigned, as a matter of convenience for the purpose of collection, to the plaintiff, a clerk in D.'s office.] *Greig v. Riordan* (1893), 99 Cal. 316: "The assignments were made for collection, and no consideration was paid by the assignee. It is matter of common knowledge that for the purpose of saving expense, commercial associations and others resort to this method. In

such cases the assignee becomes the legal holder of a chose in action, which is of no moment to the debtor."—*PER SEARLS, C.*, p. 323. Compare *Rigby v. Lowe* (1899), 125 Cal. 613, 615.

Vanstrum v. Liljengren (1887), 37 Minn. 191. *Elmqvist v. Markoe* (1891), 45 Minn. 305.

Anderson v. Reardon (1891), 46 Minn. 185: "It is no concern of the defendant whether the assignee of a claim receives the money on it in his own right or as trustee of the assignor. It is enough for him to know that the plaintiff is the party in legal interest, and that a recovery by him will be full protection against another suit by the assignor. There is no room for the distinction in this respect sought to be made by defendant between negotiable paper and other choses in action."—*PER MITCHELL, J.*, p. 186. *Minnesota Thresher Co. v. Heipler* (1892), 49 Minn. 395, given in text *infra*. *Longfellow v. McGregor* (1895), 61 Minn. 494, 496. *Struckmeyer v. Lamb* (1896), 64 Minn. 57, 60-61.

McDaniel v. Pressler (1892), 3 Wash. 636, 638; and compare *Davis v. Erickson* (1892), 3 Wash. 654, 656. *Bassett v. Inman* (1883), 7 Colo. 270, 273. *Gower v. Stockdale* (1895), 5 Colo. App. 489. *Walsh v. Allen* (1895), 6 Colo. App. 303, 305. *Srowfe v. Soto* (1886), Ariz., 21 Pac. R. 221.

Compare, *Lee v. Pennington* (1880), 7 Ill. App. 247: "A court of law will not inquire whether a plaintiff sues for himself or as trustee for some other person; it is sufficient if he has the legal interest in the subject-matter of the suit."—*PER HIGGINS, J.* *Boyd v. Corbitt* (1877), 37 Mich. 52: "The only question in this case is, whether a collection agent who holds for collection a note payable to order and which has been indorsed in blank by the owner for the purposes of collection, can bring suit in his own name. We have no doubt he may do so. The indorsement by the owner must be understood as authority for this proceeding; it passes the legal title for the purposes of collection, and this must include any necessary suit."—*PER CURIAM*. And see *Watkins v. Plummer* (1892), 93 Mich. 215, 217. Compare also *Haug v. Riley* (1897), 101 Ga. 372, 378.

On the general rule under common law pleading, see *Law v. Parnell* (1899), 7 C. B., N. S. 282, 1 Ames Cases, Bills and Notes 320, and note p. 323-4.

To the same effect is *Village of Kent v. Dana* (1900), 100 Fed. Rep. 56 [Action by Dana to recover upon 75 past-due interest coupons of \$30 each, originally attached to certain refunding bonds issued by the village of Kent, defendant below, a municipal corporation under the laws of Ohio. The bonds were not due]. Said the Circuit Court of Appeals, per SEVERENS, D. J. (p. 63): "Assuming that the savings bank delivered these coupons to Dana for the purpose of enabling him to bring suit upon them, that he gave his check therefor, and that it was understood between them that he should turn over the proceeds of the collection to the bank, and take up his check,—which is a construction of the evidence as favorable to the defendant as it would bear,—still this would suffice to enable him to bring the suit in his own name. His right to recover would be no larger than that of the bank. In that respect he would stand precisely in its position, and, if the bank was a *bona fide* holder, he would recover in that character. The title to negotiable paper payable to the bearer passes by delivery, unless the attendant circumstances show that such was not the intention. But here the bank transferred these coupons for the purpose of enabling him to bring suit. It is implied in that that such title should pass as would enable him to sue, for without it the object of the transfer could not be accomplished. Possession of such paper where it is payable to bearer, or where it is payable by indorsement to the holder, coupled with an authority to bring suit upon it, is sufficient for that purpose.

"In *Law v. Parnell*, 7 C. B. (N. S.) 282, the action was brought in the name of an agent as custodian of paper held for another, but indorsed in blank, the agent being authorized by his principal to bring suit upon it. It was held that he had sufficient title to maintain the suit, EARLE, C. J., saying:

"The bill being indorsed in blank, the bank has the right to hand it over to a third person to sue upon it, without indorsing it; and, therefore, the plaintiff, if he was the lawful holder of the bill, and had authority from the bank to do so, had a perfect right to sue upon it."

"This case was directly approved in *O'Brien v. Smith*, 1 Black, 99, 17 L. Ed. 64, where the suit was brought by the cashier of a bank upon a note belonging to it, but of which he had control for its use. In affirming a recovery, against the objection that the plaintiff could not recover in his own name, Chief Justice TANEY, speaking for the court, said:

"The authorities referred to by the counsel for the defendant in error are conclusive, and it can not be necessary to discuss these questions, which we consider as too well settled to be now open to serious controversy."

"The case of *Boyd v. Corbitt*, 37 Mich. 52, is precisely in point. There Boyd, who was a collecting agent for one Martin, received from him a note indorsed in blank, and brought

suit thereon in his own name; and it was held that he had sufficient title on which to maintain the suit.

"Where, as in Ohio, the Code of Procedure requires that the suit shall be brought by the real party in interest, it is nevertheless held that, when the plaintiff is the lawful holder of the note, it is no defence to the maker to show that the transfer under which the plaintiff holds it is without consideration, or subject to equities between him and his assignor, or colorably, and merely for the purpose of collection, and that is sufficient if he has the legal title, either by written transfer or delivery, whatever may be the equities of his relation with his assignor. *White v. Stanley*, 29 Ohio St. 423; *Eaton v. Alger*, 47 N. Y. 345; *Hays v. Hathorn*, 74 N. Y. 486; *Cottle v. Cole*, 20 Iowa, 481."

Contra (that one holding under an assignment absolute on its face, but, in fact, made for purposes of collection, can not sue under the code). *Pisley v. Van Nostern* (1884), 100 Ind. 34; *Bostwick v. Bryant* (1837), 113 Ind. 443. [The answer alleged that "said note was transferred and assigned to the plaintiff herein without consideration, and solely for the purpose of suing and collecting the same for the benefit and use of said Anna S. Bloomer, who is the real owner thereof."'] Said the court: "The statute provides that every action must be prosecuted in the name of the real party in interest. The answer shows that Anna S. Bloomer is the owner of the note, and the real party in interest. The plain provisions of the statute can not be avoided. The plea must be held good."—*Per* ZOLLARS, J., p. 459. *Deuel v. Newlin* (1891), 131 Ind. 40. *Abrams v. Cureton* (1876), 74 N. C. 523; but compare, *Wynne v. Heck* (1885), 92 N. C. 414, 416. —*Ed.*

MINNESOTA THRESHER MANUFACTURING CO.
v. HEIPLER.

SUPREME COURT OF MINNESOTA, MAY 3, 1892.

[49 Minn. 395.]

Appeal by defendant, Gottfred Heipler, from a judgment of the District Court of Lac qui Parle County, *Powers, J.*, entered July 6, 1891, in favor of the Minnesota Thresher Manufacturing Company, plaintiff, for \$73.13.

This action was commenced in a Justice Court, where plaintiff had judgment upon an accepted draft, of which the following is a copy:

MARIETTA, October 17, 1889.

Mr. Gottfred Heipler:

Please pay Minnesota Thresher Manufacturing Company or order, fifty dollars, amount due me for threshing.

JERRY RANDALL.

Witness,

WM. KANE.

It is hereby expressly understood and agreed that the Minnesota Thresher Manufacturing Company takes this order for collection only; the net proceeds of such collection to be applied on the indebtedness of the drawer of said order to the said Minnesota Thresher Manufacturing Company.

ACCEPTANCE.

I accept the within order, and agree to pay the amount named therein to the Minnesota Thresher Manufacturing Company on or before December 15, 1889.

GOTTFRED HEIPLER.

The defendant appealed to the District Court on questions of law alone, where the judgment of the Justice was affirmed.

K. O. Jerde, for appellant.¹

H. L. Hayden, for respondent.²

MITCHELL, J.—By the terms of the order or draft sued on, the drawer directed the defendant to pay the plaintiff a certain sum.

The defendant accepted the draft, expressly agreeing to pay the plaintiff the sum named. Clearly the plaintiff held the legal title to the demand, and was the real party in interest.

It did not concern the defendant that there was an agreement between the drawer and the plaintiff that the latter took the order only for collection; the proceeds, when collected, to be applied on the indebtedness of the former to the latter.

No exceptions were taken on the trial of the cause which raise any other question.

Judgment affirmed.

¹ Counsel for appellant made the following points: The plaintiff in this action is not the real party in interest. The order reads for collection only. *Rohrer v. Turrill*, 4 Minn. 407, Gil. 309; *Rock County Bank v. Hollister*, 21 Minn. 385; *Third National Bank of Syracuse v. Clark*, 23 Minn. 263.

² Counsel for respondent insisted that "the plaintiff is the real party in interest"; and that "the cases cited by appellant have no bearing on this case."

In *Lehman v. Press* (1898), 106 Iowa, 389, the action was on promissory notes executed by the defendant to Mayer, Engle & Co. Each note bore the following indorsements:

"Without recourse. Mayer, Engle & Co." "For collection acc't. Gage, Downs & Co." "For collection and return to Nat'l Bank of Republic, Chicago. W. T. Fenton, Cashier." Held that the plaintiff, who was a member of the firm of Gage, Downs & Co., and brought suit individually, could maintain the action in his own name. "Suppose that the plaintiff was acting for Gage, Downs & Co., and that the notes were purchased by that firm, the rule announced can not be sustained. One to whom a note is indorsed for collection may maintain an action thereon. *Bond Co. v. Hurd*, 18 Iowa, 559; *Cottle v. Cole*, 20 Iowa, 481. While the note is subject to defences interposed by the payer against the principal, such defences must be made in order to defeat recovery. If the plaintiff purchased the note for Gage, Downs & Co., and brought this action for their benefit, and value was paid without notice of the note's infirmities, and in good faith, the defence must fail. *Farwell v. Tyler*, 5 Iowa, 535. As affecting the rights of the payer, it is immaterial whether the principal or agent brings the action."

—Ed.

GISELMAN ET AL., EXECUTORS, v. STARR.

SUPREME COURT OF CALIFORNIA, APRIL, 1895.

[106 Cal. 651.]

Appeal from a judgment of the Superior Court of Lake County and from an order denying a new trial.

Thomas B. Bond, and Woods Crawford, for appellant.

W. W. Sanderson, and Hudson & Sayre, for respondents.

HENSHAW, J.—Action by plaintiffs as executors of the last will of S. C. Hastings, deceased, to reform, and as reformed to foreclose, a mortgage executed by defendant.

Starr executed the note and mortgage in suit to William Giselman, trustee, in payment and cancellation of an existing note, also secured by mortgage, made by him to S. C. Hastings. A few days thereafter Giselman indorsed the note,

“Pay to the order of S. C. Hastings, without recourse,

“WILLIAM GISELMAN, TRUSTEE,”

and delivered it to Hastings. At the same time he executed, as trustee, an assignment to Hastings of the mortgage. These papers, upon the death of Hastings, coming into the hands of the executors, of whom Giselman is one, this action was in due time commenced.

The defendant meets it by answer and cross-complaint, whereby he claims that he executed the note and mortgage to Giselman, as trustee, for the use and benefit of the daughters of said Hastings; that at the time of the assignment to Hastings he knew this fact, and, so knowing, took the note and mortgage without consideration; that thereafter Ella Hastings, daughter of S. C. Hastings, acquired by gift all the interest of S. C. Hastings in the note and mortgage; and that the action is not prosecuted by the real parties in interest. The named beneficiaries of the trust and the widow of S. C. Hastings are interpleaded as having or claiming some interest in the mortgage and note, and are brought in under averments that without a determination of their rights defendant can not tell to whom to pay the amount found due, nor with safety redeem in the event of a sale.

Plaintiff's answer to the cross complaint does not, in terms, deny that the note and mortgage were executed to Giselman as trustee for the use and benefit of the named children of S. C. Hastings, but does deny that they are or ever have been the property of the children or any of them. Upon all other material averments of the cross complaint it joins issue.

The children and others interpleaded by defendant one and all filed disclaimers, and in this state of the pleadings the trial was had.

¹ The arguments are omitted.

The death of Hastings and their appointment as executors admitted, plaintiffs introduced the note with its indorsement, the mortgage and the assignment of it, and rested upon this direct evidence and the presumptions arising from it.¹

1. The first point presented by appellant is that the transfer by Giselman to Hastings is void, since the note and mortgage are the only instruments creating and containing the terms of the trust, and there is nothing in them to show that Giselman had the power to sell or assign. If the note and mortgage are the only instruments creating the trust, then is the trust radically defective in naming no beneficiaries. Civ. Code, sec. 2221.

But aside from this, and treating the instruments as defining the powers of the trustee, there is contained in them, by necessary implication, the power to the trustee to sell or assign. For the promissory note is made payable to Giselman, trustee, *or order*, and the mortgage was also to Giselman, trustee, *his assigns and successors*. No evidence having been offered to overcome the presumption that Hastings took the note and mortgage for value, the transfer to him was not in violation of the trust but was valid. . . .

3. The defendant has a statutory right to have a cause of action against him prosecuted by the real person in interest (*Code Civ. Proc.*, sec. 307),²

and it was in the exercise of that right that he pleaded lack of title in plaintiffs and asked to have determined the conflicting claims of those whom he asserted to be the owners. But the purpose of the statute is readily discernible, and the right is limited to its purpose. It is to save a defendant, against whom a judgment may be obtained, from further harassment or vexation at the hands of other claimants to the same demand. It is to prevent a claimant from making a simulated transfer, and thus defeating any just counterclaim or setoff which defendant would have to the demand if pressed by the real owner. But where the plaintiff shows such a title as that a judgment upon it satisfied by defendant will protect him from future annoyance or loss, and where, as against the party suing, defendant can urge any defences he could make against the real owners, then there is an end of the defendant's concern and with it of his right to object; for, so far as he is interested, the action is being prosecuted in the name of the real party in interest. The cases which seemingly lay down the broad rule that it is not a good plea to allege that the note sued upon is the property of another and not of plaintiff, without showing some substantial matter of defence against the one asserted to be the owner, are to be read in the light of their facts, and so read they will be found to be in

¹ Referring to Code Civ. Proc. sec. 1953, subds. 8, 11, 21, 22; Civ. Code, secs. 1614, 3104, 3122-24.

² Probably, Code Civ. Proc. sec. 367: "Every action must be prosecuted in the name of the real party in interest, except as provided in sec. 369." —Ed.

strict accord with what is here said. These are cases where *prima facie* legal title is shown in plaintiff, such a title as would protect defendant if judgment were obtained upon it. If, under such circumstances, the defendant claims another to be the real owner, he must support his right to make that claim by showing that he has some equity or defence against the real owner which he can not maintain against the *prima facie* legal owner. Such is the meaning of *Price v. Dunlap*, 5 Cal. 483; and *Gushee v. Leavitt*, 5 Cal. 160; 63 Am. Dec. 116.

In the case under consideration the plaintiffs are *prima facie* legal owners, as executors, of the note and mortgage. Defendant is fully protected against those whom he names as owners and claimants by the judgment in favor of the plaintiffs, and, in addition, he neither pleads nor shows any defence or setoff which he could make against the real owner, were Ella Hastings declared to be such. Therefore, by satisfying the present judgment, defendant is discharged from liability to all of the alleged conflicting claimants; and, since he does not dispute the debt nor its amount, this is all that in equity he can ask, or should desire.¹

The judgment and order appealed from are affirmed.

McFARLAND, J., and TEMPLE, J., concurred.

¹ Part of the opinion, dealing with other points, is omitted.

D. *The real party in interest under special statutory relations.*

NOTE.—Over against the varied class of cases in which a civil action is regularly brought in the name of the beneficiary of the action as being the real party in interest within the requirement of the Codes, or sometimes in the name of the legal owner as being *prima facie* the real party in interest, there is to be placed a class of exceptions, where, by virtue of a statute, the action may be brought, yet is not necessarily brought, in the name of one who is admittedly not the real party in interest, but his representative. Between these two classes, however, there is a miscellaneous group of cases in which, because of the terms of some statute, the sole beneficiary of the suit is not recognized as a real party in interest and may not sue in his own name, but the action must be brought in the name of one who, while without a beneficial interest, is technically the only real party in interest.

WEIDNER v. RANKIN.

SUPREME COURT OF OHIO, DECEMBER TERM, 1875.

[26 O. S. 522.]

Motion for leave to file a petition in error to reverse the judgment of the District Court of Montgomery County.

The original action was brought by the plaintiffs in error, who are the widow and children of Frederick Weidner, deceased, in the Court of Common Pleas of Montgomery County, to recover damages for the negligence of the defendants in causing the death of said Frederick.

On issue joined, a trial was had, which resulted in a verdict and judgment for the plaintiffs. Afterward, at the same term, the defendants moved the court to vacate the judgment and, notwithstanding the verdict, to render judgment for the defendants, on the ground that the plaintiffs were not authorized to sue on the cause of action set out in the petition.

The motion was overruled. And it being made to appear that during the pendency of the suit Mary Weidner, one of the plaintiffs, had been appointed administratrix of said Frederick, deceased, she was ordered by the court, on her motion, to be made a party plaintiff as such administratrix. To the action of the court the defendants excepted. On error, the District Court reversed the judgment and dismissed the suit. The present proceeding is instituted to obtain the reversal of the judgment of the District Court.

William Craighead, for the motion.

J. A. Jordan, contra.¹

BY THE COURT.—The action was brought under the act of March 25, 1851, "requiring compensation for causing death by wrongful act, neglect, or default," and the amendment of March 7, 1872.²

1. Under the statute, the right to bring the action is vested in the

¹ The arguments are omitted.

² 2 S. & C. 1139; 59 Ohio L. 22.

personal representatives of the deceased; and the widow and next of kin can not maintain such action in their own names.

2. The amount recovered in such action is for the exclusive benefit of the widow and next kin, and is to be distributed among them in the proportions provided by law in relation to the distribution of personal estates of persons dying intestate.

The risk of ascertaining the persons entitled to the benefit of the recovery, and the duty of making the distribution, are not imposed on the defendant, but on the personal representatives of the deceased. Besides, if the widow and next of kin could recover in their own names a joint judgment against the defendant, the judgment might be satisfied by payment to either of the plaintiffs, and thus defeat the distribution required by the statute.

3. A good petition must contain a cause of action in favor of the plaintiff, and when it does not show such cause of action, the objection is not waived by the failure of the defendant to demur, although the facts stated may constitute a cause of action in favor of a person not a party to the suit.

We see no error in the judgment of the District Court. Leave to file a petition in error is therefore refused.¹

¹ See *Drew v. Milwaukee R. R.* (1873), Fed. Case No. 4079, where DILLON, C. J., delivering the opinion of the U. S. Circuit Court, D. Minnesota, says: "This is an action by the father to recover damages for the loss of services of his infant daughter, who is alleged to have immediately died by reason of the tortious conduct of the defendant's servants. Where death has thus ensued, it is a settled principle of the common law that no such action can be maintained. . . . So far then as any right of recovery exists where death has immediately ensued from the injury complained of, it is by virtue of express exactment. The statute of Minnesota provides that "where death is caused by the wrongful act or omission of any party, the personal representatives of the deceased may maintain an action, if he might have maintained an action, had he lived, for an injury caused by the same act or omission." Gen. Stat. p. 546, sec. 2. If an action can be maintained, it must be by virtue of this statute, and this gives the remedy to the personal representative of the deceased, that is, to his administrator or executor. *Boutiller v. The Milwaukee*, 8 Minn. 97 [Gil. 72]. Demurrer sustained." So also *Scheffler v. Minneapolis Ry.* (1884), 32 Minn. 125; *Williams v. Railroad Co.* (1890), 91 Ala. 635.

But if the death had not been immediate, the father would have been the proper party plaintiff in an action to recover for such damage as he had sustained in loss of service up to the time of the death. *Hyatt v. Adams*, 16 Mich. 180. And see *Sherman v. Western Stage Co.*, 24 Iowa, 515; *Wymore v. Mahaska County* (1889), 73 Iowa, 396, 399; *Christie v. Chicago Ry. Co.* (1895), 104 Iowa, 707.

The enactments as to the proper party plaintiff in actions for wrongful death vary greatly in the different states; but the general principle is in accord with the doctrine shown above. "The action is maintainable only by the person who is by the terms of the statute authorized to maintain it. If that person is the executor or administrator, the action can not be brought by the beneficiaries; and conversely, if the persons entitled to sue are those who are entitled to the benefit of the action, it can not be maintained by the executor or administrator." Tiffany on Death by Wrongful Act, sec. 116, and cases there cited.

Compare also *Hartigan v. Southern Pacific Co.* (1890), 86 Cal. 142, 143, *per* FOX, J.: "The right of action [for damages for wrongful death] is purely statutory, and under section 377 of the Code of Civil Procedure could be brought by either the heirs or the personal representative, but separate actions could not be brought or maintained by both. Under the former statute it could only be brought by the executor or administrator. *Kramer v. Railroad Co.* (1864), 25 Cal. 434; but that law has been so amended, in and by the code, that now the action may be maintained by either the heir or the executor or ad-

USHER *v.* WEST JERSEY RAILROAD COMPANY.

SUPREME COURT OF PENNSYLVANIA, MAY 6, 1889.

[126 Pa. 206.]

Before PAXSON, C. J., STERRETT, CLARK, MCCOLLUM, and MITCHELL, JJ.

No. 328, January Term 1888, Sup. Ct.; court below, No. 33, March Term 1886, C. P. No. 4.

On February 27, 1886, Josephine Usher brought an action in case against the West Jersey Railroad Company, the narr charging, *inter alia*, that the defendant company, in carrying John F. Usher from Camden to Cape May, by its carelessness and negligence caused his death and by reason thereof became liable to the plaintiff and her child, the widow and next of kin of the deceased, for the injury sustained by them. The defendant pleaded, not guilty.

At the trial on November 16, 1887, before WILLSON, J., the plaintiff proved the death of John F. Usher, a citizen of Pennsylvania, by being thrown from the defendant company's train, while a passenger thereon, near Malaga, N. J., and that he left to survive him a widow, the plaintiff, and one child. The plaintiff then put in evidence the statute of New Jersey, act of March 3, 1848, P. L. 151, secs. 1 and 2.¹

The plaintiff then rested, when the defendant moved the court to order a nonsuit, for the reason that the action was not brought by the personal representative of the deceased husband, as required by the New Jersey statute, the death having been caused in that state. The court allowed the motion, and ordered judgment of nonsuit to be entered, with leave, etc. Motion, rule, etc.

The rule to show cause why the judgment of nonsuit should not be vacated having been argued, on January 21, 1888, the court, WILLSON, J., citing *Knight v. Railroad Company*, 108 Pa. 250; *Dinnick v. Railroad Co.*, 103 U. S. 11, and *Patton v. Railroad Co.*, 96 Pa. 169, discharged the rule, whereupon the plaintiff took this writ, assigning as errors the order entering the judgment of nonsuit and the order discharging the rule to show cause why the judgment should not be vacated.

Mr. George S. Graham (with him *Mr. John Roberts*), for the plaintiff in error.

Mr. David W. Sellers, for the defendant in error.²

ministrator. On this subject the court has recently said: 'But one action is permitted, and that action may be brought either by the heirs of the deceased, or by his personal representative; and when one action is brought and the court has obtained jurisdiction of it, that is the only action which the statute permits.' *Munro v. Dredging Co.* (1890), 84 Cal. 515.—*Ed.*

¹ This statute, so far as material, is quoted in the opinion.

² The arguments are omitted.

MITCHELL, J.—John F. Usher was killed by an accident upon the defendant's road in New Jersey, under circumstances of negligence, as we must assume, for which he would have had an action had he been only injured. But having been killed, his right of action, under the universal rule of the common law, terminated with his life. If any right of action remained, it must have been wholly based upon statute, and as the occurrence out of which, if at all, the right must arise, took place in New Jersey, it is to the statutes of that state alone that we must resort to ascertain the nature of the right, and the party in whom it is vested.

It is not questioned that the action is transitory, and that it may be sustained in the courts of this state, if jurisdiction be acquired over the defendant. Adverse decisions have been made on this point in several states, but for Pennsylvania it has been settled by this court in *Knight v. Railroad Co.*, 108 Pa. 250. Comity will enforce rights, not in their nature local, and not contrary to the policy of the government of the tribunal, no matter where arising, and without regard to whether they are of common law or statutory origin. There is no difference in this respect between such rights, except in the presumption that common law rights in other states are similar to our own, and the absence of such presumption, and consequent necessity of proof, in regard to rights merely statutory.

The statute of New Jersey, March 3, 1848, P. L. 151, provides in section 1,

"That whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Section 2. That every such action shall be brought by and in the names of the personal representatives of such deceased person; the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate," etc.

The present action was brought by the widow of Usher, and we thus have the question presented whether she can maintain the action in her own name and to her own use.

The question has never been expressly decided in this state, nor, so far as we can learn, elsewhere.¹ . . . The general course of deci-

¹ Part of the opinion, relating to Pennsylvania decisions which have a collateral bearing on the question in hand, is omitted.

sions bearing collaterally upon it, is, however, adverse to sustaining such an action except by the very one whom the statute names as entitled to bring it. Thus in *Woodard v. Railroad Co.*, 10 Ohio St., 121, it was held that an administrator appointed in Ohio could not maintain an action in Ohio for a death caused by negligence in Illinois, although it was proved that the statutes of both states were alike, and gave such an action to the administrator. The court held that the Illinois statute gave the action only to the Illinois administrator, and that while the Ohio administrator had a right of action, by the Ohio statute, for causes arising in that state, yet that statute could not support an action for causes arising in Illinois.

Woodard v. Railroad Co. was approved and followed by the Supreme Court of Massachusetts in *Richardson v. Railroad Co.*, 98 Mass., 85, upon the same grounds, the only difference being that in the latter case it did not appear that there was any law in Massachusetts giving an action under similar circumstances.

A broader view of the statute was however taken in *Leonard v. Navigation Co.*, 84 N. Y. 48, and *Dennick v. Railroad Co.*, 103 U. S. 11, where it was held that the statutes, though not having any extra-territorial force, would be recognized by comity, and that as they give an action to the personal representative generally, without limitation as to the authority under which he is appointed, an administrator of the home jurisdiction can maintain the action, even for causes arising in another state, upon proof of the laws of such state authorizing the action.

With these latter decisions accords our own case of *Knight v. Railroad Co.*, already cited. But none of the cases raise or discuss the question involved here, whether a widow can maintain an action in her own name, under a foreign statute, which expressly directs the action to be brought by the administrator, though for the ultimate benefit of the widow and next of kin.

We are thus left to discuss the question upon general principles.

At the outset we may say that the action can get no support from the fact that a closely similar statute in this state gives the right to sue, expressly and exclusively, to the widow, if there be one, for the benefit of herself and her children. It is not seriously claimed that our statute has any extra-territorial force which can produce rights from occurrences in New Jersey. On this point all the authorities agree.¹

The language of the New Jersey statute is that "every such action shall be brought by and in the names of the personal representatives of such deceased person." As this language is entirely clear, unquali-

¹ *Citing*, *Whitford v. Railroad Co.* 23 N. Y. 484; *Woodard v. Railroad Co.* 10 Ohio St. 121; *Richardson v. Railroad Co.* 98 Mass. 85; *Com. to use of Allen v. Railroad Co.* 45 Md. 41; *Selma, etc., R. Co. v. Lacey*, 43 Ga. 461; *Anderson v. Railroad Co.* 37 Wis. 321; *McCarthy v. Railroad Co.* 18 Kan. 46.

fied, and peremptory, it would seem to settle the question without more. But it is sought to escape this conclusion by insisting, first, that as the amount recovered is to be for the exclusive benefit of the widow and next of kin, the widow may be allowed to sue for it in her own name; and secondly, that the second section concerns only the remedy, and therefore may be disregarded by the courts of Pennsylvania, who may administer the rights of the *lex loci*, under the procedure of the *lex fori*. I believe, however, that a brief consideration will show that neither of these grounds is tenable.

As to the first, there is no room for latitude of construction. The meaning of the language used is plain and unambiguous, and its directions mandatory. It is an established rule that statutory remedies are to be strictly pursued, and we have no right when the legislature have commanded one form, to say that another will serve the purpose equally as well. The law-making power has settled the remedy as well as the right, and courts are not authorized to vary or depart from either. Moreover, the distinction made in this statute between the party having the right of action and the ultimate beneficiary, is familiar to all common law states, and is of settled importance, especially in those where, as in New Jersey, the administration of law and equity is not only in separate forms, but by separate tribunals. In the face of this settled distinction, clearly recognized and commanded by the statute, it would be an act of judicial usurpation to say that the mandate of the statute may be disregarded. In this connection the language of our brother GREEN, in *Books v. Danville Bor.*, 95 Pa. 166, is very strong and pertinent: "No other persons have been clothed with the right, and hence no other persons can sustain such actions. The present action is brought by an administrator to recover damages for injuries resulting in the death of the intestate. But the legislature has not declared that such a person may maintain such an action, and hence the right to do so does not exist."

But secondly, is the question of the party who may sue merely a question of the remedy, and therefore determinable by the law of the forum? Undoubtedly there are cases where it is so. Whether an infant shall sue by guardian or by next friend, and whether an assignee shall sue in his own name or that of his assignor, and the like, are clearly questions of procedure only. But where the matter is not of form merely, but of right, the remedy must follow the law of the right. The second section of the statute in question can not be disregarded, or separated from the first; they are as closely interwoven, and as necessary to each other, as if they were part of the same section. This is plain from the most cursory examination. The first section confers no right, of any kind, or on anybody. It merely imposes a liability. The second section confers the right, and without it the first would be utterly nugatory and ineffective. Apart, the first gives no right, the second imposes no liability; together, they give the liability,

the right, the party to enforce the right, and the party entitled to the benefit, and they give all these together, by plain words which constitute one grant, to wit, an action, to be enforced as given, and not capable of being split up into different rights, with varying remedies, according to the tribunals in which they may chance to be asserted.

If this result were at all doubtful on principle, there is another consideration of controlling weight. It is unquestionable that in New Jersey the personal representative alone can sue, and it is equally clear that he can maintain his action there, notwithstanding this action, or any other, brought by another party in another jurisdiction. It would be a strange perversion not only of comity, but of justice to entertain an action here, which would either oust the right of the legal party in the place where the cause of action arose, or subject the defendant to as many separate recoveries as parties could be found who might be entitled under the laws of different forums to bring actions under similar circumstances.

Nor is the argument helped by the suggestion that as the action by the personal representative is only a means to an end—*i. e.*, the benefit of the parties ultimately entitled to the damages, the court can control the disposition of the verdict, so as to administer the rights of all parties according to the law of New Jersey. Why should our courts undertake such an unnecessary task, in the face of a direct prohibition by the law of New Jersey? The administration of the law of another jurisdiction is never desirable, and at best is full of difficulties and uncertainties. It is assumed *ex necessitate* when assumed at all, and it would certainly be pushing comity beyond its legitimate bounds, to assume to do for the tribunals of New Jersey what they certainly would not do for themselves, administer the rights of one party through a suit brought by another.

Before closing I may say that the statute of New Jersey, as of most of the other states, is an almost literal transcript, as far as it goes, of the 9 and 10 Vict., c. 93, commonly known as LORD CAMPBELL'S ACT. I have examined the English digests without finding any case bearing upon this question, but it may be noted, as some indication of the view taken of that act, that a possible inconvenience, such as is alleged in this case, has been provided for by the 27 and 28 Vict., c. 95, s. 1, which enacts, that if there shall be no executor or administrator, or there being such, he shall fail to bring suit for the space of six months after the death, then such action may be brought by and in the name of all the persons for whose benefit the action by the executor would have been. This is certainly a strong indication of the understanding that nothing but a statute could authorize an action in the name of anyone but the personal representative to whom the right was given in the first instance.

The learned judge was right in entering a non-suit and the judgment is *affirmed*.¹

¹ See also *Oates v. Union Pacific Ry.* (1891), 104 Mo. 514.

WOODEN v. THE WESTERN NEW YORK AND PENNSYLVANIA RAILROAD COMPANY.

COURT OF APPEALS OF NEW YORK, MARCH 10, 1891.

[126 N. Y. 10.]

Appeal from an interlocutory judgment of the General Term of the Superior Court of the City of Buffalo, overruling a demurrer to the complaint herein.

This was an action to recover damages for the alleged negligent killing of plaintiff's husband by defendant.

The complaint alleged, in substance, that plaintiff is a resident of New York State; that she was appointed by the surrogate of Erie County, N. Y., administratrix of her husband's estate; that defendant is a domestic corporation operating a railroad, a portion of which extended into Pennsylvania; that her husband was killed in said state by its negligence; that he left no will, but left plaintiff, his widow, and three children him surviving; that in consequence of such negligence plaintiff and said children sustained damages to the amount of \$20,000; that the statute of Pennsylvania allows an action in such case to be maintained by the widow, the sum recovered to go to her and the children in the proportion they would take his other personal property in case of intestacy; that such statute does not limit the amount of recovery; that such statute is similar to the provision of the Code of Civil Procedure of the State of New York, in relation to actions to recover damages for negligence causing death. Judgment was demanded for \$20,000.

John G. Milburn, for appellant.

Harlow C. Curtiss, for respondent.¹

FINCH, J.—This appeal is from an interlocutory judgment overruling a demurrer and determining that the complaint assailed stated a good cause of action. That pleading alleged that the plaintiff was and is a resident of this state, and the defendant, a corporation created and existing under our laws. The contest thus is between a resident individual and a domestic corporation. The latter owned and operated a line of railroad extending beyond our boundaries into the adjoining state of Pennsylvania, and the complaint alleged that in that state the plaintiff's husband was killed by the negligence of the defendant company. The complaint further averred that the statute of that state gave a right of action for the injury sustained by the widow and children; that the remedy could be enforced in the name of the former as plaintiff, but for her own benefit and that of the children; and that such statute was of similar import to that existing in our

¹ The arguments are omitted.

own jurisdiction. Judgment was thereupon demanded for damages in the sum of twenty thousand dollars.

The demurrer interposed raised two objections: first, that the statutes of the two states were not similar, but different; and, second, that the action could not be maintained here in the name of the widow, but only in that of an executor or administrator of the deceased; and the final result sought to be established was that the widow could not maintain an action in this state because that is contrary to our statute, and that the administratrix could not, because that is contrary to the Pennsylvania statute; and so, there is no remedy whatever in our jurisdiction.

Certain propositions essential to the inquiry before us have been explicitly determined in *McDonald v. Mallory*, 77 N. Y. 546, and need no other citation for their support. That case held that the liability of a person for his acts, whether wrongful or negligent, depends in general upon the law of the place in which the acts were committed; that actions for injuries to the person in another state are sustained here without proof of the *lex loci* because they are permitted by the common law which is presumed to exist in the foreign state; that such presumption does not arise where the right of action depends upon a statute which confers it; and that in such case the action can only be maintained here by proof that the statutes of the state in which the injury occurred give the right of action and are similar to our own.

Upon the question of similarity we have also held that the two statutes need not be identical in their terms or precisely alike, but it is enough if they are of similar import and character, founded upon the same principle and possessing the same general attributes. *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 53. It is quite evident that the two statutes are of similar import. They are founded upon the same principle, are aimed at the same evil, construct the same sort or kind of action, and give it for the benefit of the same class of individuals. In both the utter failure of redress at common law where the injury ended in death was the injustice for which a remedy was enacted; and in both the new action was given for the benefit of those who had suffered an injury as the consequence of the wrong. This fundamental agreement in the main and substantial characteristics of the two statutes is not affected by the differences of detail which the demurrer points out.

The first is that by the *lex loci* the proper person to bring this action, and the only person who can maintain it, is the widow, while by our law the right of action is given to the executor or administrator. But it is given to the latter not in his broad representative character, but solely as trustee, in a case like the present, for the widow and children. *Hegerich v. Keddie*, 99 N. Y. 267. It is not a right which survives to the personal representatives, but a right created anew. The real parties in interest, those whose injury is redressed, whose right is vindi-

cated, to whom all damages go, are one and the same in both forums. If the formal parties are different, the substantial and real parties are identical, and the difference in the trustee appointed by the law to represent their right is not such a difference as to bar our tribunals from their jurisdiction, or make the two statutes dissimilar under the rule.

It is claimed, however, that even in that event the right of action accruing in the place of the transaction can only be enforced in our jurisdiction under our remedial forms, and so, should have been brought by the plaintiff not as widow, but as administratrix, to which office she had been appointed in this state. But it must not be forgotten that the cause of action sued upon is the cause of action given by the *lex loci*, and vindicated here and in our tribunals upon principles of comity. 84 N. Y. 53, *supra*. That cause of action is given to the widow in her own right and as trustee for the children, and we open our courts to enforce it in favor of the party who has it, and not to establish a cause of action under our statute which never in fact arose. We refer to the *lex fori* and measure it by and compare it with the *lex loci*, I think, for two reasons; one, that the party defendant may not be subjected to different and varying responsibilities, and the other, that we may know that we are not lending our tribunals to enforce a right which we do not recognize, and which is against our own public policy; and we do not refer to our law as creating the cause of action which we enforce. It is the cause of action created and arising in Pennsylvania which our tribunals vindicate upon principles of comity, and, therefore, must be prosecuted here in the name of the party to whom alone belongs the right of action; and that rule the courts of Pennsylvania enforce where the cause of action arises here, by permitting it to be brought by the executor or administrator to whom by our law the right is given, although not by their own. *Usher v. West Jersey R. Co.*, 126 Penn. St. 207.

But the second difference relied on is that in Pennsylvania there is no restriction upon the amount of damages which may be recovered, while in our state they can not exceed five thousand dollars. That restriction pertains to the remedy rather than the right. *Dennick v. Central Railroad of New Jersey*, 103 U. S. 11. It is a limitation upon the discretion of the jury in fixing the amount of damages, but not upon the right of action or its inherent elements or character. The restriction indicates our public policy as to the extent of the remedy, and the plaintiff who chooses to avail herself of our remedial procedure must submit to our remedial limitations and be content with a judgment beyond which our courts can not go. They can not exceed it in a case arising here, and no principle of comity requires them to enlarge the remedy which the plaintiff voluntarily seeks. There may be, there very possibly is, an exception to that rule, resting upon its own peculiar reasons, in a case where the defendant is not, as here, a domestic

corporation, formed under our law, and so entitled to the benefit of our remedial limitations, but it is a corporation of the state within whose jurisdiction the cause of action arose, and by whose law no restriction upon the amount of damages is permitted or enacted. We do not decide that question; but the same reasoning which would expose such a corporation to the law of its own jurisdiction would serve equally to justify the right of the domestic corporation to be protected by the remedial limitations of its jurisdiction. The difference between the two statutes, therefore, does not strictly affect the rule of damages, but rather the extent of damages, and that extent, as limited or unlimited, does not enter into any definition of the right enforced or the cause of action permitted to be prosecuted. And so the causes of action in the two forums are not thereby made dissimilar. These views lead to an affirmance of the interlocutory judgment.

That judgment should be affirmed with costs but with leave to the defendant to withdraw the demurrer and plead anew within twenty days after service of a copy of the judgment entered upon filing the *remittitur*, and upon payment of the costs of the action from the interposition of the demurrer to that date.

All concur.

Judgment accordingly.

POPP *v.* CINCINNATI, HAMILTON & DAYTON RAILWAY
COMPANY.

UNITED STATES CIRCUIT COURT, S. D. OHIO, W. D., MAY 22, 1899.

[96 *Fed. Rep.* 465.]

The action is by Minnie Popp, as administratrix of John L. Popp, deceased, against the Cincinnati, Hamilton & Dayton Railway Company, to recover damages for his wrongful death. The petition is as follows:

Plaintiff is a citizen of the state of Indiana, and is the duly appointed and qualified administratrix of the estate of her husband, John L. Popp, deceased. The defendant is a corporation organized under the laws of Ohio, and is a citizen of Ohio and resident of this district, and was on the 21st day of September, 1898, operating a railroad between Cincinnati, Ohio, and Toledo, Ohio, and other points.

On said 21st day of September, 1898, plaintiff's decedent was in the employ of defendant as a locomotive engineer, and while riding upon an engine in the discharge of his duty near Leipsic, Ohio, on the line of said railroad, said engine became derailed, and plaintiff's decedent was caught in the wreck which followed, and was killed. The said derailment and death of plaintiff's decedent was caused wholly by the negligence of defendant, its agents and employees, in maintaining, at and about the place where said derailment occurred, its roadbed, ties, track, frog, and other

appliances in a defective and dangerous condition, and unfit for running trains thereon, which was known to defendant, or could by due care on its part have become known, and was unknown to said decedent, John L. Popp, and could not by due care on his part have been known to him.

The said John L. Popp left surviving him a widow, Minnie Popp, who, as administratrix, is plaintiff herein, and one child, a boy aged 10 years, who have been damaged by reason of the premises in the sum of \$10,000, for which plaintiff asks judgment.

To this petition the defendant demurs.

C. M. and E. W. Cist, for plaintiff.

Maxwell & Ramsey, for defendant.

THOMPSON, DISTRICT JUDGE.—This cause is submitted to the court upon a demurrer to the petition upon the ground that it does not appear therefrom that the court has jurisdiction of the action.

1. It is said that, for aught that appears in the petition, the plaintiff may have been appointed administratrix in a foreign country, or in some state of the Union other than Ohio, and that under section 6133 of the Revised Statutes of Ohio a foreign administrator can not maintain an action "for death caused by wrongful act" under sections 6134, 6134a, and 6135 of said statutes. This claim is based upon a construction of section 6133 which would exclude actions for wrongful death as not being brought by the foreign executor or administrator "in his capacity of executor or administrator," because any damages recovered in such action would not become assets of the estate, but would be apportioned among the wife, husband, children, or next of kin of the deceased. I do not think this construction sound. I think the manifest intention of the legislature was to allow foreign executors and administrators to prosecute any action which might be prosecuted by an executor or administrator appointed in this state, "in like manner and under like restrictions as a nonresident may be permitted to sue."¹

2. It is said that the beneficiaries under the statute are the real parties in interest, and that federal jurisdiction, based upon diverse citizenship, has relation to the citizenship of the real parties in interest, and not to that of mere nominal parties; that the plaintiff is a mere nominal party, and, for aught that appears in the petition, the other beneficiary may be a citizen of Ohio, and therefore, jurisdiction not appearing upon the face of the petition, the action must be dismissed. The plaintiff, in the opinion of the court, is not a mere nominal party. She is a real party, so far as the prosecution in the suit is concerned. It is not a case where the suit is being prosecuted in the name of somebody else, where the party actively conducting the litigation is doing it in the name of the state, in the name of a next friend, or the like, but it is a case where the administratrix is the active party in the prosecution of the suit, who institutes it, carries it on, and, with

¹ *Citing, Duchesse D'Auxy v. Porter*, 41 Fed. 68; *Noonan v. Bradley*, 9 Wall. 394, 403.

the sanction of the court, may compromise or dismiss it. She has absolute control of, and is responsible for, the conduct of the case.¹

In the *Stewart Case*, 168 U. S. 445, 18 Sup. Ct. 105, the question was whether a cause of action, arising in Maryland, could be sued upon in the District of Columbia, owing to the peculiarities of the Maryland statute requiring suits to be brought in the name of the state. It was not a question of federal jurisdiction, and the court held that, the state of Maryland not being the beneficiary of the fruits of the litigation, the suit might be brought in the District of Columbia by the personal representative of the deceased. The case is thus stated in the digest: "An action for death caused by negligence in Maryland, where the statute provides for an action in the name of the state as nominal plaintiff, but for the benefit of certain prescribed heirs, is not such a special remedy for a purely statutory right of action as would prevent the maintenance of an action by the administrator in the District of Columbia, where the statute provides for actions by personal representatives in such cases for the benefit of certain prescribed heirs, although the beneficiaries may not be exactly the same under the two statutes."

In suits by the state on relation of A. B., or by a next friend, the state and the next friend are not real parties, in the sense that they have an interest in the result of the litigation, nor in the sense that they control the litigation; but executors, administrators, trustees, etc., although they have no personal interest in the fruits of the litigation, yet are real parties in the sense that they control, and are responsible for, the litigation.

The demurrer will be overruled.

HAYNES ET AL. v. HARRIS.

SUPREME COURT OF IOWA, DECEMBER TERM, 1871.

[33 *Iowa*, 516.]

Action at law upon a promissory note, executed by defendant to Maria Haynes, April 14, 1860, and due one day after date.

The petition alleges that the payee of the note died intestate in the State of Indiana, July 20, 1862; that no administration was ever granted upon her estate; and that plaintiffs are her sole heirs. It is

¹ *Citing*, Harper v. Railroad Co., 36 Fed. 102; Coal Co. v. Blatchford, 11 Wall. 172; Knapp v. Railroad Co. 20 Wall. 117; Chappedelaine v. Dechenaux, 4 Cranch, 306; Childress v. Emory, 8 Wheat. 642; Clarke v. Mathewson, 12 Pet. 164; Bonnafee v. Williams, 3 How. 574; Osborn v. Bank, 9 Wheat. 738; Irvine v. Lowry, 14 Pet. 298; Rice v. Houston, 13 Wall. 66; Davis v. Gray, 16 Wall. 220; Florida v. Anderson, 91 U. S. 676; Walden v. Skinner, 101 U. S. 589; Davies v. Lathrop, 12 Fed. 353; Shirk v. City of La Fayette, 52 Fed. 857; Reinach v. Railroad Co., 58 Fed. 33; Morris v. Lindauer, 4 C. C. A. 162, 54 Fed. 23; Bangs v. Loveridge, 60 Fed. 963; Pennington v. Smith, 24 C. C. A. 145, 78 Fed. 399.

alleged that upon her death the real and personal estate owned by her came into the possession of plaintiffs as her heirs. Plaintiffs aver that the note in suit, upon the death of the payee, became the property of plaintiffs as her heirs, and that they still own and hold the same. The answer denies plaintiffs' ownership of the note, and avers that the property in said note, upon the death of the payee, vested in an administrator appointed, or to be appointed; that, under the laws of the state of Indiana, the time for taking out letters of administration has not elapsed; and that a suit upon the note by an administrator is not barred.

The cause was tried to the court without a jury, and judgment rendered for plaintiffs, in the amount of the note and interest. Defendant appeals.

Mynster & Hight, for the appellant.

Clinton, Hart & Brewer, for the appellees.¹

BECK, CH. J.—Upon the trial of this case, under the issues formed by the pleadings, the parties agreed that the allegations of the petition, to the effect that no administration had been taken out, upon the estate of the payee of the note, in Indiana, or elsewhere, and that she died intestate, at the time and place stated in the petition, should be taken as true. This admission, and the note sued upon, was all the evidence introduced by plaintiffs. Defendant gave in evidence the statutes of the state of Indiana, which provide no limitation by lapse of time, against granting administration, and that the personal representatives, when duly appointed, succeed to the personal estate of the deceased. No other evidence was given by either party. It will be remarked, that it is shown, neither by the pleading nor the evidence, that the estate of the payee of the note was not indebted, nor is it averred or proved that plaintiffs paid debts of the deceased, or held the note for that purpose. We are called upon to decide whether, under the facts of the case, plaintiffs can maintain this action.

At common law the personal property of an intestate goes to the administrator and not to the heirs. Upon the appointment of an administrator his title in such property relates back to the death of the intestate. There is no statute in this state changing these rules. *Rhodes v. Stout*, 26 Iowa, 313.

The fact that no administrator has been appointed does not confer upon the heirs the property in the personal effects of the deceased. If delay in granting administration for ten years, or any other longer time, would have this effect no reason can be given why the same result would not be accomplished by a delay of five years, or a shorter period. It is very plain that the length of time intervening between the death of the intestate and the appointment of the administrator, can have no influence in determining that the property belongs to the heir. If, upon the death of the intestate, the title of personal

¹ The argument for appellant is omitted.

property does not vest in the heir, it will not, in the future, on account of delay in taking out administration. We conclude that, in the case before us, the property in the note sued on is not shown to be in plaintiffs. The fact that the time limited by the statutes of this state in which administration may be granted had expired, does not demand a different conclusion. If the heir, at the death of the intestate, has no property in the personal effects of the estate, it is difficult to see how the fact that no other person has will give him the title.¹

II. Plaintiffs' counsel insist that, as plaintiffs are the real parties in interest, they may, under the statutes of this state, maintain this action. The difficulty just here is that the evidence in the case does not disclose the fact to be that plaintiffs are the real parties in interest. Suppose the estate to be indebted, the creditors would be first entitled to the proceeds of the note, and if it should be insolvent the heirs would have no interest whatever in the note. But, counsel reply, the time for taking out letters of administration has expired, and the creditors, if there be any, are barred from establishing their claims against the estate. We are not prepared to hold that a creditor, in no case, could not reach the note in suit and subject it to his debt. It is quite probable that, if a creditor holding a claim against the estate would show that he had been guilty of no laches, as for instance that he had not known of the death of the intestate, or that through the fraudulent acts and representations of plaintiffs and defendant, he had delayed in taking out letters of administration or the like, he would be aided by some proceeding known to the law or chancery to recover his claim out of the note sued on in this case. There is no evidence before us showing that the estate is free from debts that may be enforced against the note.

We are not called upon to discuss the question, but there is no impropriety in our expressing the opinion that plaintiffs are not without a remedy in case it be made to appear that there are no debts against the estate and that letters of administration, on account of the lapse of time, can not be taken out. In such a case plaintiffs' legal or equitable rights to the proceeds of the note could not be questioned. If the law would supply no remedy, equity, which "is the correction of that wherein the law, by reason of its universality, is deficient," would afford relief.

III. The plaintiffs' counsel contend that it does not appear from the petition, that plaintiffs claim to hold the note as heirs, and base their right to recover upon that ground. They insist that the petition avers generally the ownership of the note by plaintiffs, and, as

¹ As supporting these views, *Beck, C. J., cited, Woodin v. Bagley*, 13 Wend. 453; *Beecher v. Grouse & Bruce*, 19 id. 306; *Jenkins v. Freyer*, 4 Paige's Ch. 47; *Lawrence v. Wright*, 23 Pick. 128; *Hall v. Burges*, 5 Gray, 12; *Coons v. Nall's Heirs*, 4 Litt. 264; *Brunk v. Means*, 11 B. Monr. 217; *Roorback v. Lord*, 4 Conn. 347; *Smith v. Drury*, 37 Mo. 20.

they are in possession of the instrument, they must be presumed to be the owners in the absence of proof to the contrary; and, there being no such proof in this case, judgment was properly rendered in their favor.

We do not think the petition will support the construction put upon it by counsel. The obvious meaning of the pleading is that plaintiffs are the owners of the note because of their heirship. It is quite apparent that the pleader intended to convey that idea. A critical consideration of the language used strengthens this conclusion.

In our opinion the evidence before the court below does not support the judgment. It is therefore *Reversed*.¹

PHINNY v. WARREN.

SUPREME COURT OF IOWA, DECEMBER TERM, 1879.

[52 Iowa, 332.]

Action in equity upon a promissory note. The note was executed by one Coonrod as principal and the defendant as surety, and made payable to one Joseph P. Phinny, who died intestate March 22, 1867. The plaintiffs are the heirs of the intestate, and claim to be the owners of the note as such heirs. No letters of administration ever issued upon the intestate's estate. This action was brought after the lapse of five years from his death, but within ten years from the time the note matured. The plaintiff set up as the ground of equitable jurisdiction the lapse of five years and the fact that no letters have been issued. There was judgment for the plaintiffs. The defendant appeals.

*M. E. Cutts, J. A. Hoffman, and J. H. Warren, for appellant.*¹

C. P. Searle and J. F. Lacey, for appellees.

ADAMS, J.—The defendant insists that the plaintiffs have no remedy at law because there has been no administration, and no distribution, and no remedy in equity because there is no ground of equitable jurisdiction. If the time had not expired within which an administrator might be appointed, it would seem to be certain that the action could not be maintained. *Haynes v. Harris*, 33 Iowa, 516.

But it is shown that the statutory period has expired and that no administrator can be appointed. Whether the heirs can now be regarded as holding the legal title to the note we need not determine. They acquired an interest in it at the death of the intestate, subject only to such rights as an administrator might have if one should be appointed.²

As no administrator can now be appointed, it appears to us that their interest is subject to nothing. Whatever obstacle, then, there

¹ Followed in *Baird v. Brooks* (1884), 65 Iowa, 40.

² Citing, *Perryman v. Green*, 39 Ala. 133; *Thompson v. Thomas*, 30 Miss. 152.

might have been at one time to their maintaining an action, it has ceased to exist.

The amount of personal property in this state which has not been administered upon, and never can be, is doubtless very large. It would do incalculable mischief to adopt a rule which would prevent the heirs or their vendees from maintaining an action in relation to such property. Whether the plaintiffs' remedy was at law instead of equity we need not inquire. The defendant does not complain that he was entitled to a trial by ordinary proceedings of which he has been wrongfully deprived. We think the judgment must be *Affirmed*.

ON REHEARING.

PER CURIAM.—Upon the death of the payee of the note it may be conceded that the note became the property of the administrator, if there was one. But if no administrator is appointed it will not do to say the note ceased to be property. Property can not be thus blotted out. There is no statute which requires that letters of administration should be taken out, or that imposes a penalty for not so doing. It may be that at common law personal property goes to the administrator, and if none is appointed it possibly would escheat. But the statute provides that personal property not required for the payment of debts shall be distributed to the heirs, and this must be the rule whether an administrator has been appointed or not. The statute further provides that administration can not be granted after the lapse of a certain period of time, except possibly where there has been fraud, accident, or mistake.

During such statutory period it may possibly be the title to the property is in abeyance. At its expiration, however, the title thereto vests in the heirs at law, and they may maintain an action thereon. The title of the heirs is joint until there has been a division, just as it would be if the property consisted of real estate; to recover which all the heirs must join, notwithstanding their shares may be different. The note in question belongs to the plaintiffs jointly, and it matters not what their respective shares may be; therefore the plaintiffs could have maintained an action at law on the note. They, however, entitled their action in equity. No motion, however, was made to transfer to the law docket, nor was any objection made to the form of the action, nor was it insisted that the action should have been at law in the court below. It can not, therefore, be made for the first time in this court. It is insisted that the views herein expressed are antagonistic to what was said in *Haynes v. Harris*, 33 Iowa, 516. To some extent this may be true, but that case is clearly distinguishable from this, because the statutes of Indiana do not provide any limitation or statutory bar to granting letters of administration. It appeared, therefore, in that case, that administration might at some future time be granted. *The petition for a rehearing is, therefore, overruled.*¹

¹ Distinguished in *Baird v. Brooks* (1884), 65 Iowa, 40, 42.

GALPIN v. LAMB.

SUPREME COURT OF OHIO, DECEMBER TERM, 1876.

[29 O. S. 529.]

The action originally was brought in the Court of Common Pleas of Trumbull county by John Lamb, the defendant in error, against Samuel D. Galpin, the plaintiff in error.

The petition shows the following facts :

The plaintiff below, Lamb, commenced an action, January 11, 1869, in the Common Pleas of Trumbull county, to foreclose a mortgage on certain real estate in said county, against Asa E. Andrews, the mortgagor, making R. W. Ratcliff and the plaintiff in error, Galpin, defendants. Subsequently a decree was rendered by said court, finding the liens against said property to be, 1st, in favor of said Ratcliff, \$1,908.50; 2d, in favor of said Galpin, \$5,854.11; 3d, in favor of said Lamb, \$8,738.60; rendering judgment accordingly, and ordering that, in default of payment of said sums and costs by said Andrews, an order of sale issue to the sheriff to sell the property. The said sums being wholly unpaid within the time fixed by the judgment, an order of sale was duly and regularly issued to the sheriff, who, proceeding in all respects according to law, exposed the property to sale on the 1st day of January, 1870, when said Galpin bid and offered for the purchase of said property the sum of \$11,505, which being more than two-thirds the appraised value of the same, and he being the highest and best bidder, the sheriff struck off and sold said premises to him, and made due return of the same on said order of sale to the court.

Galpin failed and refused to pay any part of the said sum of \$11,505 so bid and offered by him, and so continuing and refusing to pay, the court at the February term, in the year 1870, made in said cause the following order, to wit: "The sheriff having returned into court the order of court heretofore issued herein with his proceedings thereon, and showing a sale to Samuel D. Galpin, in all respects according to law, and it appearing to the court that said purchaser has failed to comply with the terms of said sale by paying the amount of the purchase money so bid by him for said land, said sale is for that reason not confirmed, and it is ordered that the sheriff proceed to sell said premises as heretofore ordered and according to law."

Under this last order of sale the sheriff sold said premises to the plaintiff for the sum of \$10,500, which was all that could be obtained therefor, and which was all that said premises were then worth, and which sale being duly and regularly made and returned by said sheriff to said court, was, at the next term thereof, to wit, at the June term, 1870, duly and regularly approved and confirmed by said court, and said purchase money being paid by the purchaser, said sheriff, by order of said court, executed and delivered to the purchaser a good and sufficient deed, conveying to him the title to the premises.

By reason of the facts aforesaid, and of the additional interest upon the sum so due said Ratcliff and Galpin, and of the increased costs in the ac-

tion, all of which were required to be paid from the purchase money before any of it could be paid upon the plaintiff's claim, and which amounted in all to the sum of \$8,187.17, which amount was duly paid upon the amount found due and costs, from said purchase money, there was left only the sum of \$2,313.17 applicable to the payment of plaintiff's claim, which sum was paid thereon, and which was over \$1,200 less than would have been paid on his claim but for the refusal of said Galpin to pay said purchase money. No other or further sum has been paid on plaintiff's said claim, and he can not collect any part thereof of the said Andrews, as he was and is entirely insolvent, and has been adjudged a bankrupt by the proper court, and obtained a discharge from all his debts under and by virtue of the bankrupt law of the United States.

To this petition Galpin demurred. The demurrer was overruled. He then answered, and the case was tried to a jury, resulting in a verdict for the plaintiff for \$1,005. A motion by defendants for a new trial was heard and overruled.

The case was taken on error to the district court, and by that court reserved for decision here.

The error assigned is that the common pleas erred in overruling the demurrer to the petition.

H. H. Moses and W. T. Spear, for plaintiff in error.

George M. Tuttle, for defendant in error.¹

WHITE, J.—It has been ruled in many cases that a sheriff may maintain an action in his official capacity, against the purchaser of real estate at judicial sale, to recover the price at which the property was struck off at such sale.²

In making such sale according to the commands of the writ under which he acts, he is discharging his duty as an officer of the law. As is said in *Armstrong v. Vroman*, 11 Minn. 220, until the money realized from the sale of the land comes into the hands of the sheriff, the judgment creditor has no legal interest in it. It is the sheriff's duty to make the money as commanded by the writ. For this purpose he has the right to enforce the collection by suit, if necessary, both for the sake of securing his own fees and that he may have funds wherewith to respond to the judgment creditor.

The contract of purchase is made with the officer as representing all the interests involved in the suit in which the judgment or decree of sale is rendered. He and the purchaser are the only parties to the contract of purchase; and he alone can maintain an action against the purchaser to recover the purchase money.

The parties to the judgment or decree have different interests and stand in different relations to the property, some holding the relation

¹ The arguments are omitted.

² *Citing*, *Ennis v. Waller*, 3 Blackf. 472; *Hand et. al. v. Grant, Sheriff*, 5 S. & M. 508; *Chappell, Sheriff, v. Daun*, 21 Barb. 17; *Armstrong v. Vroman*, 11 Minn. 220; *Gwynne on Sheriffs*, 355.

Compare also the opinion of PEARSON, C. J., in *McKee, Sheriff, v. Lineberger* (1873), 69 N. C. 239, 240.

of debtor and others that of the creditor. But however numerous the parties or diverse their interests, the officer represents them all, and none of the parties stand in such relation to the contract of the purchaser as to entitle them to maintain an action on it.

In the first place, they are not parties to the contract; in the second, they are not united in interest; and in the third place, if each could maintain an action, the purchaser would be subject to a multiplicity of suits on a legal cause of action in which he is entitled to a jury trial.

Nor is the question affected by the insolvency or bankruptcy of the judgment debtor. Although insolvent, he is still interested in having the judgment paid; and if a bankrupt, his assignee has such interest, for, to the extent that the judgment is paid, the claims against the assets in the hands of the assignee are diminished.

The action is supposed to be maintainable by the plaintiff below, Lamb, on the ground that if the first sale had been completed, the purchase money would still have been insufficient to discharge his lien, and that the whole of the purchase money would have gone to him after paying the prior incumbrances.

But that this ground is untenable was expressly decided in *Adams v. Adams*, 4 Watts, 110. The court in that case say: "The sheriff, in making the contract of sale with James Adams (the purchaser), was not acting as the agent of the plaintiff, nor yet of any one else. He is considered the principal himself in such cases, and the legal, as well as the real party making the contract of sale. Although it be true that he acts in the character of a trustee, yet it must be borne in mind that it is as an officer of the law that he does so; and that it is from the law he derives all his power and authority, and in sales of property made by him, as sheriff, under this authority, he alone has the right to receive the money arising therefrom, and is responsible for the legal appropriation of it, unless it is brought by him into court for that purpose. It would inevitably produce great confusion and clashing of suits to permit other persons besides the sheriff, in their own names, to maintain suits against the sheriff's vendees for breaches of their contracts made with him. It would also be inconsistent with every principle of analogy in the law. The court were right, then, in directing the jury that the plaintiff was not entitled to recover the money in question, because there was no privity of contract between him and the intestate of the defendants. There was none, most certainly, either in fact or in law."

The same doctrine was subsequently affirmed in *Gaskell v. Morris*, 7 Watts & Serg. 32. And it may be remarked in regard to these decisions of the supreme court of Pennsylvania, that in that state there is no separate chancery jurisdiction, but that law and equity are administered there as here in the same forum.

The case of *Mayer v. Wick*, 15 Ohio St. 548, is not inconsistent with the foregoing decisions. In that case the sale had been confirmed, and

the officer had thus become responsible for the purchase money. He had tendered the deed to the purchaser, and assigned his right of action to the plaintiff in the decree under which the property was sold, and the latter was allowed to maintain the action for the purchase money.

The objection to the plaintiff's maintaining the action is not waived, as is claimed in the argument, by the failure to demur, on the ground of a defect of parties plaintiff. The objection is not that there is a defect of parties, but that no right of action is shown to exist in the plaintiff.

The code does not give such right of action. The rules of the code in respect to parties are substantially the same as those which prevailed in equity before the adoption of the code. Where no right of action existed in a party either at law or in equity, the code does not create one. Whether, if the sheriff should, by reason of collusion with the purchaser, refuse to bring the action, or, on being indemnified, should refuse, in a proper case, to do so, the parties in interest might not maintain a suit in equity against the sheriff and the purchaser, we need not now inquire; for no such case is made in the petition.

It is claimed by the plaintiff in error that the law by which a purchaser who fails to pay the purchase money is subject to the loss resulting from a resale of the property, is not applicable to real estate, especially not to such property sold at judicial sale.

In Indiana the subject is regulated by statute, and the purchaser may be proceeded against by motion and charged with the loss resulting from the resale.¹ The same is true in Maryland, and, perhaps, in some of the other states.

In this state we have no statute on the subject, and whether the rule adopted in Pennsylvania prevails here we need not now definitely decide. Assuming for the purposes of the present case that it does, there is another fatal defect in the case of the plaintiff below.

Before the purchaser could be charged with a loss resulting from a resale, he ought to have been advised that the second sale was to be made at his risk.

No such notice was given by rule of court or otherwise. The purchaser might well have supposed from the order of the court refusing to confirm the sale, and directing the property to be again sold without qualification or condition, that the first sale had been abandoned, and that all parties had elected to take the chances of a second sale.

We are of opinion, therefore, that the court erred in overruling the demurrer to the petition.

The judgment is reversed, the demurrer to the petition sustained, and the petition dismissed.

¹ *Citing, Williams v. Lines*, 7 Blackf. 46; *Laverty v. Chamberlain*, Ib. 556.

GREER v. HOWARD.

SUPREME COURT COMMISSION OF OHIO, JANUARY TERM, 1885.

[41 O. S. 591.]

The plaintiffs in error, Greer & King, on March 29th, 1878, recovered a judgment against D. Carroll & Son, in the superior court of Montgomery County, for the sum of \$332 and \$28 costs. They caused execution to be immediately issued on this judgment to the sheriff of the county, who levied upon the property of Carroll & Son. While the sheriff held the property under his levy, George M. Young, as assignee of Carroll & Son, under an assignment for the benefit of creditors, replevined the property from him and gave a bond in replevin as required by law, with John Howard and O. M. Gottschall as sureties thereon.

Before the action in replevin came to trial, the plaintiff, George M. Young, the assignee, died, and the action was revived in the name of Thomas C. Roseberry, who was duly appointed as the successor of Young, the assignee.

On the trial of the action of replevin the plaintiff, the assignee, failed and the sheriff recovered a judgment against him for the value of the property taken in replevin. The plaintiffs, Greer & King, in the judgment upon which the execution issued under which the property was taken by the sheriff, were not substituted for the sheriff in the suit in replevin. Nor did the sheriff assign to them the replevin bond or the judgment recovered in the action. Upon this state of fact, Greer & King brought their action upon the replevin bond against Howard and Gottschall and recovered judgment in the common pleas, which judgment was reversed by the district court.

The proceeding here is to reverse this judgment of the district court.

Iddings & Iddings, for plaintiffs in error.

Young & Young, for defendants in error.¹

McCAULEY, J.—²

The action on the bond, however, was brought by the plaintiffs in the execution under which the sheriff levied on the property, without alleging an assignment of the bond to them by the sheriff, or an assignment to them of the judgment in replevin, and without alleging any reason why they should bring the action, such as the refusal or neglect of the sheriff to enforce the bond or to assign it or the judgment to them. They might clearly maintain the action if the bond had been assigned to them or if the judgment had been assigned,

¹ The arguments are omitted.

² After holding that the revivor was properly made, and that the judgment was one for which the sureties on the replevin bond were liable.

which would have effected an assignment of the bond as an incident to it. Or if the sheriff had refused or neglected to assign either the judgment or the bond, or to enforce the bond, in the latter case making the sheriff a party. This would not be their only remedy, but this one they would clearly have under the circumstances supposed. The plaintiffs in the common pleas failed to set forth a state of fact sufficient to entitle them to a judgment on the bond. Their petition was demurred to and the demurrer overruled. The district court reversed the judgment of the common pleas for the error of that court in overruling the demurrer. The district court in this reversal was clearly right.

Judgment affirmed.

E. *When the action may be brought in the name of one who is not a real party in interest.*

I. A TRUSTEE OF AN EXPRESS TRUST; A PERSON WITH WHOM OR IN WHOSE NAME A CONTRACT IS MADE FOR THE BENEFIT OF ANOTHER.

NOTE.

The statutory provisions here have two forms. By the terms of the New York Code, as amended in 1851 (§ 113), the scope of the phrase "trustee of an express trust" was extended, as respects the law of parties to actions, so as to include "a person with whom or in whose name a contract is made for the benefit of another."¹ In some codes, however, "the person with whom or in whose name a contract is made for the benefit of another" is not thus brought within the class of trustees of express trusts, but is coordinated with them and with executors and administrators.² The distinction, while important in the law of trusts, is not carefully regarded by the cases on the law of parties plaintiff; and the doctrine appears to be practically the same under the few codes which observe the distinction as under the great majority which disregard it.

In either case the general doctrine on the subject has to do with several markedly different conditions, according as the plaintiff (1) has been directly declared a trustee with respect to certain property, persons, and purposes; or, (2) has merely contracted in his own name for the benefit of a disclosed principal; or, (3) has merely contracted in his own name for the benefit of an undisclosed principal; or, (4) is merely an agent who, with no contract in his own name for the benefit of his principal, attempts in his own name to enforce a right which has accrued to his principal.

¹ See the forms of the enactment in New York, Missouri, California, Indiana, Minnesota, Oregon, Wisconsin, Kansas, Nevada, North Dakota, South Dakota, Idaho, Montana, North Carolina, South Carolina, Utah, Colorado, and New Mexico, given *ante*, pp. 183-192.

² See the forms of the enactment in Kentucky, Iowa, Ohio, Washington, Arkansas, Wyoming, and Oklahoma, given *ante*, pp. 189-192.

In the late code of Connecticut the enactment has more nearly the form of the enactment in the New York code of 1849; compare, *ante*, pp. 188 and 192. For a construction of this early New York provision, see *Grinnell v. Schmidt* (1850), 2 Sandf. 705, 710: "Mercantile agents and factors who, according to the usage and custom of merchants, do business in their own names, but for other parties, are *trustees* in the strict sense of the term [as used in § 113 of the New York code, before its amendment in 1851.] . . . The trust, though not created by a formal deed or instrument, yet appears upon the face of every order contained in the correspondence of their principals, in pursuance of which they act, and may therefore well enough be called an *express* trust."—*PER* MASON, J., delivering the opinion of the Superior Court of the City of New York. —*Ed.*

GARDNER *vs.* ARMSTRONG.

SUPREME COURT OF MISSOURI, MARCH TERM, 1862.

[31 *Mo.* 535.]

Gardner, as trustee under a deed of trust made by Adela Douthett to secure the payment of certain notes therein mentioned, sued Armstrong to recover damages occasioned by the refusal of the latter to comply with his purchase of the premises described in the deed.

The petition alleges that Adela Douthett made the deed of trust to plaintiff, etc.; that plaintiff sold the property at public vendue, for cash; that defendant purchased at the price of \$8,000; that plaintiff tendered defendant a deed; that defendant refused to accept the deed and pay the price aforesaid; that plaintiff thereupon advertised and resold the land, for the sum of \$4,500. Judgment was asked for \$3,500, the difference between the prices bid at the two sales.

On the trial, the defendant offered no evidence; judgment was given for plaintiff in the amount asked. A motion in arrest of judgment being denied, the defendant appealed.¹

Krum & Harding, for appellants.

J. D. Coaller and A. Hamilton, for respondent.²

DRYDEN, J.—The point raised by the motion in arrest of judgment is based upon the ground that "the petition does not state facts sufficient to constitute a cause of action." It is urged in objection to the petition, that, as the plaintiff has no interest in the trust debt, the injury complained of was not an injury to him, but to the trust creditors, and therefore that he does not show in himself a cause of action.

The objection assumes what is far from being true, that the beneficial interest in a contract determines the question who is to sue for a breach of it. The law regards a person to whom a promise is made, and with whom it is to be performed, as the one having the legal interest in the contract; and in actions *ex contractu* at common law, it is a fundamental rule of pleading that "the action must be brought in the name of the party in whom the legal interest in such contract is vested," without reference to who has the beneficial interest in the same. 1 Chitty, *Pleadings*, pp. 2 and 3.

This rule, in its application to cases like the present, is not thought to be changed by our statute relating to parties to actions. R. C. 1855, p. 1217, § 2, Art. 2.

In the argument at bar there was much discussion of the question whether the plaintiff, as to the damages sought to be recovered, is trustee for the trust creditors or for the trust debtors, or for either, or

¹ The statement of facts has been abridged.

² The arguments are omitted.

for both. If we are right in the view we have taken, it relieves us of the consideration of the question until the controversy shall arise between those who alone have an interest in its determination. It is enough that at law the defendant is answerable to the plaintiff, and to him only, for the alleged breach of contract. He has no more reason to be concerned about what may become of the damages that may be recovered than he should have had about what should have been done with the price bid for the land had he paid it.¹ . . .

The other judges concurring, the judgment is affirmed, with ten percent damages.²

¹ Part of the opinion, on other points, is omitted.

² See also *Beck v. Haas* (1888), 31 Mo. App. 180. The action was upon a promissory note. Said the Court, per THOMPSON, J.: "The note sued on was made payable to the plaintiff as trustee for his wife, now deceased. It appears from the evidence that the plaintiff's wife died in 1881, and that no letters of administration had ever been taken out upon her estate. It is therefore urged that the action is not well brought, but that it would be properly brought in the name of an administrator of Mrs. Beck, deceased.

"This point is clearly not well taken. In the first place, no defence other than the statute of limitations was pleaded. In the second place, the plaintiff was the legal holder of this note, and whether he held it in a trust capacity or not is immaterial, so far as the rights of the defendant are concerned. As the holder of it, he is the trustee of an express trust, and the action is properly brought in his name, under the statute. *Rev. Stat.*, Sec. 3463. With the application of the trust fund after he collects it, the defendant has nothing to do."

Compare *Nelson v. Eaton* (1858), 7 Abb. Pr. 305, 307: "This action was brought by the plaintiffs as trustees. In their complaint they set forth the trust instrument or agreement, by which they were not only created such trustees, but under which the note on which the suit was brought, with other notes, came into their hands, as such trustees, as collateral security for the payment of certain notes of the parties, executing the trust instrument; and by the trust instrument it appears that the plaintiffs had a right to sell the said collaterals at public or private sale at their option, and without advertising the same, or otherwise giving any notice.

"The trust instrument, expressly specifying the terms on which the note on which this suit is brought, came into the plaintiffs' hands as such trustees, and expressly giving them the right to sell, etc., but not to sue, the plaintiffs had no right to bring that action as such trustees.

"There is no room for presumptions arising from their being the holders of the note. They themselves set out the manner in which they hold it and their rights over it. They had a right to sell it without advertising it, or otherwise giving notice; but with the express agreement before us there is no place for a presumption that they had a right to sue it as the owners and holders.

"I think the judgment of the Court below, overruling the defendant's demurrer to the complaint, should be reversed, and that there should be judgment for the defendant on the demurrer, with costs."—*Per* SUTHERLAND, J. —*Ed.*

CONSIDERANT *v.* BRISBANE.

COURT OF APPEALS OF NEW YORK, DECEMBER TERM, 1860.

[22 N. Y. 389.]

Appeal from a judgment of the Superior Court of New York City, sustaining a demurrer to a complaint. The complaint was in these words:

"The plaintiff, for an amended complaint in the above entitled action, by Francis H. Dykers, his attorney, complains of the defendant, and avers—

"*First.* That the said defendant, on or about the first day of March, 1855, at the city of New York, applied to the said plaintiff, acting as the executive agent, and as such agent authorized to receive subscriptions to the stock of the European and American Colonization Society in Texas, a corporation duly created by and existing under the laws of Belgium, in Europe, and of which said corporation the business name is Bureau, Guillon, Godin & Co., and authorized said plaintiff to subscribe the name of said defendant in the books of the said company, as an original subscriber for the stock of said company, known as premium stock, to the amount of \$10,000, which said plaintiff then and there undertook and faithfully promised to do.

"*Second.* That the said defendant then and there made and executed, in writing, two subscription notes, or contracts, for the payment, in the aggregate of the sum of \$10,000, for the shares so taken by the said defendant in said company, and delivered them to the plaintiff, which said notes were in the words and figures following, to wit:

"(1)

"New York, *March* 1st, 1855.

"\$5,000.

"On the first day of July, 1856, I promise to pay V. Considerant, as executive agent of the company, Bureau, Guillon, Godin & Co., the sum of five thousand dollars, for which I am to receive stock of said company, known as premium stock (*actions à prime*), to the amount of \$5,000, value received.

A. BRISBANE.

"(2)

"New York, *March* 1st, 1855.

"\$5,000.

"On the first day of September, 1856, I promise to pay to V. Considerant, as executive agent of the company, Bureau, Guillon, Godin & Co., the sum of \$5,000, for which I am to receive stock of said company, known as premium stock (*actions à prime*), to the amount of \$5,000.

A. BRISBANE.

"*Third.* That said defendant therefore delivered both of said notes to the plaintiff.

"*Fourth.* That said plaintiff, acting as such executive agent, and under and by virtue of the authority vested in him by said defendant as aforesaid, duly caused the name of said defendant to be entered on the books

of said company, at Brussels, in Belgium, for the amount of stock so subscribed for by him, and caused certificates, in the usual form issued by said company, to be issued in the name of said defendant.

"*Fifth.* That this plaintiff has always been ready and willing to deliver to the defendant the certificates of said company of the share or interest, so subscribed for by the defendant as aforesaid, or intended so to be (and, on the maturity of each of said notes, caused the same to be tendered to the said defendant), on the payment by the defendant of the sum agreed to be paid by him for the same, and said plaintiff is still ready and willing so to do, but said defendant has hitherto wholly neglected and refused to pay the sum so agreed to be paid by him as aforesaid, and still wholly neglects and refuses so to do, to the damage of the plaintiff of \$10,000 and upwards.

"Wherefore, said plaintiff demands judgment against said defendant for the sum of \$10,000, with interest on \$5,000 from the 3d day of July, 1856, and interest on \$5,000 from the 4th day of September, 1856, besides the costs of this action."¹

To this complaint the defendant demurred, on the ground that it did not state facts sufficient to constitute a cause of action.

The Superior Court at Special Term held the complaint sufficient and overruled the demurrer. On appeal, the General Term sustained the demurrer, on the ground that the action could not be maintained by the plaintiff; and the plaintiff appealed.

Francis H. Dykers and *John Slosson*, for the appellant.

William B. Leeds, for the respondent.

WRIGHT, J.—It is conceded, as it must be, that the complaint states a cause of action in the corporation, for whom the plaintiff acted as executive agent, against the defendant. The defendant subscribed for \$10,000 of the stock of the company, through its agent, and agreed and promised in writing to pay \$5,000 of the sum on the 1st July, 1856, and the remaining \$5,000 on the 1st September, 1856. The company, and not the plaintiff, was the party beneficially interested, and the duty, or obligation, to issue the stock (which was the sole consideration for the defendant's agreement and promise), rested upon, and could only be performed by, such company. Had the corporation, on the 1st of July, or the 1st of September, refused to issue the stock, no action could have been maintained by anybody on the instruments executed on the 1st March, 1855, by the defendant and set out in the complaint. On the other hand, the defendant's remedy would be against the corporation, and not against the person professedly acting as its agent. Thus the corporation had the exclusive beneficial interest in the subject of the defendant's promises. The plaintiff was not personally bound by the contract; and the corporation was bound, unless the contract was a *nudum pactum*. The averments of the complaint

¹ The copy of the complaint is from Browne and Cook's revised edition of the *New York Reports*. —Ed.

exclude any other construction than that the plaintiff acted in the transaction as the agent of the company; and if we look exclusively to the subscription notes, and interpret the defendant's promises from what appears on the face thereof, it is clear that the official character of the plaintiff was alone in the mind of the promisor and contemplated in the promise, and that such promises were not to him personally, but in his official or representative capacity.

The facts stated, therefore, in the complaint, showed the corporation and the defendant to be the parties in whom the interest in the contract vested, and the plaintiff, who made the contract, having no beneficial interest in it, nor being bound by it, nor furnishing any part of the consideration for it. The single question is, whether the plaintiff may maintain an action for the breach of it.

The Code provides that "every action must be prosecuted in the name of the real party in interest," except that, "an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted." (Code, §§ 111, 113.) And it is declared, that "a trustee of an express trust, within the meaning of the section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another. (§ 113.)

It is plain that the plaintiff is not the real party in interest; but the question remains, Is he "a trustee of an express trust," within the definition of that term in section 113 of the Code? Is he "a person with whom, or in whose name, a contract is made for the benefit of another?" As such, he would be authorized to sue on the subscription notes in his own name, notwithstanding the beneficial interest was in his principals.

The subscription notes, or contracts, purported on their face to be made with the plaintiff as executive agent of the foreign company, and the promise was to pay to him, as such agent, the sums of money named therein, for which the defendant was to receive the stock of the company. They were not contracts, therefore, directly with the principals, with a promise to pay the plaintiff for their benefit. On such a case, no action could be maintained by the promisee, though the promise might support an action by the company. They were, rather, express contracts to pay the plaintiff for the use of, and on a consideration moving from, the company.

Before the Code, I think a contract of this character would have raised such a legal interest, by way of trust, as that an action might have been maintained by the plaintiff. In cases of written contracts, the right of action followed the legal title. This title was in the party entitled to the performance of the contract; and the party entitled in law was the one to whom, by its terms, it was to be performed, or his assignee, if assignable. Written express contracts, by

or with agents contracting in their own names, with or without a description of agency, were not exceptions to the rule. Such a contract was with an agent, and in his name, when executed by him or to him in his individual name, without expressing the agency, though the other party knew he was acting as agent in the transaction, and contracted with him in that capacity; and it was equally with him, and in his name, though he was described as agent on its face, when negotiated with him, and by its terms to be performed by or to him. The words expressive of the agency might, if necessary for the convenience of the remedy, be rejected as a mere description of the person. The payee of a note, although received by him as an agent for another, might sue upon it in his own name. *Buffum v. Chadwick*, 8 Mass. 103.

So when a bill of exchange was endorsed to "S. S. F., cashier," he might maintain an action upon the bill in his own name, notwithstanding he might be obliged to account to the bank of which he was cashier. *Fairfield v. Adams*, 16 Pick. 381.

In *Sargent v. Morris* [1820], 3 Barn. & Ald. 277, BAYLEY, J., stated the rule as follows: "If an agent acts for me and on my behalf, but in his own name, then, inasmuch as he is the person with whom the contract is made, it is no answer to an action in his name to say that he is merely an agent, unless you can also show that he is prohibited from carrying on that action by the person on whose behalf the contract was made." When there was an express promise in writing to an agent, the action might be in the name of the agent. To hold otherwise, as was said by BRONSON, J., would be to declare the contract nugatory, except where it was in the form of negotiable paper which could be transferred to the principal, so as to enable him to sue in his own name. *Harp v. Osgood*, 2 Hill, 216.

In the present case, before the change of the rule, I can not well perceive how the company, who had the exclusive beneficial interest, whilst the express promise was to pay the plaintiff, and who had, therefore, the legal interest by way of trust, could have maintained an action at law in its own name to recover the money. Undoubtedly, when a contract had been made directly with the principal, by a mere agent having no beneficial interest in it, such agent—the case of a factor being, to some extent, an exception—could not support an action thereon. Where A, having a general power of attorney to collect debts, etc., in the name and for the use of B, delivered a contract to an attorney to collect, who gave him a receipt for it generally, as for collection, it was held that A could not maintain an action in his own name against the attorney for money collected by him on the contract so put into his hands. *Gunn v. Cantine*, 10 Johns. 387.

But, though the agent in that case had no beneficial interest in the contract, it was admitted that he might have sued in his own name if there had been an express promise to pay the money to him. *Harp v. Osgood*, *supra*.

Where the contract was express to pay A for the use of B, on consideration moving from B, it raised such a legal interest by way of trust as would maintain an action in A's name, though A may have acted as the agent of B, with or without disclosing his agency. In such a case, to entitle the agent to sue in his own name, it was not necessary that the beneficial interest should be in him, or that the consideration should proceed from him. Nor was it required that he should himself be personally liable on the contract, as a right to sue as trustee could exist without any pretence of a personal liability.

Prior to the Code, therefore, I am of the opinion that the plaintiff might have maintained an action on the express contracts set out in the complaint for the benefit of his principals, having a legal interest in them by way of trust. The promise being to him in writing for the benefit of another, he would have been deemed the party "with whom, or in whose name," the contracts were made, and in whose name alone the promise could be enforced in a court of law.

The Code, however, abrogated the common law rule, that the right of action followed the legal title, and made the beneficial interest the sole test of the right. In adopting the latter rule, it was easily to be seen that there was a class of cases in which it would be extremely prejudicial to the remedy, as well as difficult of application, viz., the case of executors, persons authorized by statute to sue, and trustees of an express trust. To obviate this, it was specially provided that, in these cases, the executor, or statutory party, or trustee of an express trust, might sue without joining with him the person for whose benefit the action was prosecuted. (Code, § 113.) The term "trustee of an express trust" had, however, acquired a technical and statutory meaning. Express trusts, at least up to the adoption of the Revised Statutes, were defined to be trusts created by the direct and positive acts of the parties by some writing, or deed, or will; and the Revised Statutes had abolished all express trusts, except as therein enumerated, which related to land. If the 113th section of the code was to be confined and limited to those enumerated as express trusts, the practical inconvenience arising from making the beneficial interest the sole test of the right to sue, and which that section was intended to obviate, would continue to exist in a large class of formal and informal trusts. Accordingly, in 1851, the section was amended by adding the provision that "a trustee of an express trust, within the meaning of the section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." It is to be observed that there is no attempt to define the meaning of the term "trustee of an express trust," in its general sense; but the statutory declaration is, that those words "shall be construed to include a person with whom, or in whose name, a *contract* is made for the benefit of another."

The counsel for the respondent insists that the sole intention of the

legislature, in amending the section, was to remove a doubt that had been expressed, whether a factor or other agent who had, at common law, a right of action on a contract made for the benefit of his principal (by reason of his legal interest in the contract), was, by the Code, deprived of that right. But no such limited intention can be inferred from the words of the statute. Indeed, it is only by a liberal construction of the section that the case of a contract by a factor (an individual contract) can be brought within it at all. It is intended, manifestly, to embrace, not only formal trusts, declared by deed *inter partes*, but all cases in which a person, acting in behalf of a third party, enters into a written, express contract with another, either in his individual name, without description, or in his own name, expressly in trust for, or on behalf of, or for the benefit of, another, by whatever form of expression such trust may be declared.¹ It includes, not only a person with whom, but one in whose name, a contract is made for the benefit of another.

The contracts set out in the complaint are within its terms. They are made in the name of the plaintiff, for the benefit of the Belgian corporation. The subscription notes are payable to the plaintiff by name, as "executive agent" of principals named, and are, therefore, contracts made with him for the benefit of another, and in a representative capacity necessarily involving a trust.

The court below assumed the ground that, where the promisee, though named in the contract, was mentioned only in respect of his official or representative character, and not as promisee individually, the promise would not be deemed made to him; and, hence, such a case would not be embraced within section 113. This can not be the true construction of the statute. If the promise be to a person described as agent, and it appears upon the face of the writing, expressly or by implication, that it was made for the benefit of another, it is within the intention, and, I think, the terms of the enactment. It could hardly have been the intention, as contended for by the counsel of the respondent, to include a contract which did not, on the face of it, in terms or by implication, declare or disclose a trust, in the category of "express trusts;" whilst one, expressing the trust on its face, was to be excluded. The obvious policy of the legislature was to reserve the right of action in all cases of express trusts, whether the instrument in terms declared the trust, or by necessary implication disclosed it. In this case, if the words, "as executive agent," are to be treated as a mere description of the person, then the promise was to the plaintiff individually; but if the plaintiff is to be considered as acting in a representative capacity, they are contracts made with him in that capacity for the benefit of another, and necessarily involving a trust. Indeed, the terms "executive agent" indicate an

¹ Compare *Waterman v. Webster* (1888), 108 N. Y. 157, 163, where DANFORTH, J., reaffirms and distinguishes this doctrine.
—Ed.

active trust. Had the subscription notes on their face been made payable to the plaintiff "in trust for the company," etc., no one would doubt of their falling within the statute. In legal effect, the contracts as much involve a trust as though the same was declared in words.

The court below reached the conclusion that, though the plaintiff's name was contained in the contract, it was accompanied by such a designation of the representative character in which he was named as promisee that the promise was, in judgment of law, made to the principal and not to himself; and that, in such cases, the contract could not be said to be made in his name. It is assumed that the written contract in this case was made, in legal effect, with the principals, by the plaintiff, acting as their mere naked agent, and, in a legal sense, can not be said to be made with or in the name of the plaintiff. It would follow, from such an assumption, that neither before nor since the Code, could the plaintiff sue thereon. This, however, is an incorrect view. Before the Code, I think, the remedy at law, upon an express contract of this character, must have been enforced in the name of the plaintiff; but that, if there was any doubt upon this subject, the plaintiff clearly falls within that description of person who, by the 113th section of the Code, shall be construed to be a "trustee of an express trust," and, as such, authorized to sue. Since the adoption of the general rule, that actions, either of a legal or equitable nature, must be prosecuted in the name of the real party in interest, the person for whose benefit the action was prosecuted might be joined with the trustee; but section 113 expressly authorizes suits to be maintained by the trustee alone.

Upon the whole, I am of the opinion that the action may be prosecuted in the name of the plaintiff, and that the demurrer can not be sustained. The judgment of the Superior Court should be reversed, and that of the Special Term affirmed.

SELDEN, DAVIES, CLERKE, and WELLES, JJ., concurred.

COMSTOCK, C. J., BACON, and DENIO, JJ., dissented.

*Judgment at General Term reversed and that at Special Term affirmed.*¹

¹ In his dissenting opinion, DENIO, J., remarked: "If this action had been prosecuted under the rules as to parties which prevailed before the Code of Procedure was enacted, the question would have been, whether the contract was made with the plaintiff, as the promisee, or with the corporation mentioned in the complaint, by the plaintiff, as its agent. If the plaintiff was considered the contracting party, the action could be maintained in his name, though the corporation were the party beneficially interested; the rule, in actions *ex contractu*, being that the suit must be in the name of the party in whom the legal interest is vested, though the equitable interest should be in another person. The Code, though adopting as a general rule the practice prevailing in courts of equity, by which the parties having the beneficial interest were required to be brought before the court, made an exception in favor of the trustees of express trusts, and in favor of parties with whom and in whose name contracts were made for the benefit of other persons. Such contractors, in order to include them within the words of the exception, were to be considered trustees of express trusts. The question to be determined is, therefore, pre-

cisely the same which would have arisen if there had been no Code, namely, whether, in point of law, this contract was made by the defendant with Mr. Considerant, the plaintiff, or with the corporation named Bureau, Guillon, Godin & Co.

"In strictness of language, the promise is to the plaintiff. The defendant in terms promises to pay the money to him. But it is not a case in which the words which follow—'as executive agent of the company Bureau, Guillon, Godin & Co.'—can be taken as a descriptive addition to his name; for they are clearly inserted for no such purpose, but to denote the character in which he is to receive the money. It is to be paid to him as agent for a principal who is named. There is nothing on the face of the instrument, or in the averments of the complaint, to show that the plaintiff has any pecuniary interest in the performance of the agreement, or that he was under a mutual obligation to furnish the shares for which the sum promised was the price, or that any motive of interest or convenience existed for interposing a formal contracting party between the promisor and the party entitled to the thing promised. In such case my opinion is that the contract is generally deemed to be made with the person named as the real party in interest in the transaction.

"The cases, in which a similar question has arisen, are numerous; but they are not quite in harmony with each other.

"Without undertaking to lay down a principle which will determine all cases of this kind, I think it may safely be stated that where it appears that the duty which the instrument acknowledges is due to a corporation whose agent or officer is by the contract appointed to receive the thing promised, and nothing appears to show that he has any interest apart from his principal, or that there was any motive for interposing the agent as a contracting party between the promisors and the party equitably entitled, it ought to be held that the promise was made to the latter. That rule, applied to this case, would lead to the affirmance of the judgment appealed from."

COMSTOCK, CH. J., and BACON, J., concurred in this opinion.

NOTE.—OTHER INSTANCES OF TRUSTEES OF EXPRESS TRUSTS, ETC.

Lewis v. Graham (1857), 4 Abb. Pr. 106. [B. assigned certain claims to C. in trust to collect the same, and out of the proceeds to pay the expenses, a certain commission, and then certain debts owed by B., the balance to be paid over to B.]: "The assignee had full power to collect such claims in his own name. By § 111 of the Code of Procedure every action is to be brought in the name of the real party in interest, but by § 113 an exception is made in favor of a trustee of an express trust. . . : The subsequent clause of 1851 was not intended to limit the meaning of the term 'trustee of an express trust' to the case therein mentioned, but to extend it so that it should include a person with whom a contract is made for the benefit of another."—*Per* INGRAHAM, F. J.

Sandmeyer v. Dakota Ins. Co. (1891), 2 S. D. 346, 351: "That an assignment for the benefit of creditors which purports to convey to the assignee the absolute legal and equitable title to an assigned property charged with a trust to pay debts constitutes the assignee the 'trustee of an express trust,' who is authorized, by § 487a Compiled Laws, to bring an action in his own name, seems to be the settled doctrine of the courts. *Pom. Rem.* § 178; *Bliss Code Pl.* § 262; *Lewis v. Graham*, 4 Abb. Pr. 106; *Mill Co. v. Vandall*, 1 Minn. 246; *Foster v. Brown*, 65 Ind. 234; *Wheeler v. Hawkins*, 101 Ind. 486; *Butterfield v. Macomber*, 22 How. Pr. 150. And this would be the same, we apprehend, whether the assignment be general or special. But to have this effect the assignment must convey and transfer the absolute legal and equitable title to the assignee, free from all control of the assignor. It must be an absolute appropriation of the property to the payment of the debts. It must pass both the legal and equitable title to the property absolutely beyond the control of the assignor, except, perhaps, as to the unemployed balance after the payment of the debts, which would naturally revert to the assignor. But when a debtor transfers money or property to a third person to pay to his creditors, without transferring the absolute legal and equitable title, the relation of such third person to the debtor is that of an *agent* until the creditor assents to the transaction; and until such consent the debtor may revoke the intended appropriation; and, when collections are to be made by the agent in the name of the debtor, and the business transacted in the debtor's name, the title to the property remains in the debtor, and an action must be brought in the debtor's name. . . . There being no absolute transfer of these policies vesting the legal and equitable title in Sandmeyer [the assignee], free from the control of Harrison [the assignor], and Sandmeyer not being the real party in interest, and not being the trustee of an expressed trust, as con-

templated by the statute, he was not authorized to bring the action in his own name, and the court properly refused to admit the so-called assignment in evidence."—*PER* CORSON, J.

Kimball v. Spicer (1860), 12 Wis. 668. [The complaint averred that the written promise sued upon had been assigned and transferred by the promisee to the plaintiff, "who from thence hitherto has continued to hold, own, and possess the same for the benefit of the Kenosha County Bank, and is entitled to the sum of money due and owing from the defendant thereon, for the benefit of the Kenosha County Bank aforesaid"] : "Since the complaint alleges that the stock subscription of the defendant was transferred and assigned to Kimball for the benefit of the bank, this constitutes him a 'trustee of an express trust.' See *Grinnell v. Schmidt*, 2 Sandf. 705."—*PER* COLE, J.

Gardiner v. Kellogg, (1861), 14 Wis. 605, 608. [G. was indebted to H. on a draft for \$400, and had a claim against K. on notes secured by mortgage for \$500. G. and H. agreed that the latter should place his draft in the hands of G.'s attorney, that the attorney should sue on the notes and mortgage in G.'s name and apply the proceeds to the payment of the draft, less a fee of \$50] : "The action was properly brought in the name of the present plaintiff (G). . . It was doubtless contemplated that the collection would go on in his name, and, being the legal owner, he may properly be denominated a trustee of an express trust within the meaning of the statute."—*PER* DIXON, C. J.

Clark v. Titcomb (1864), 42 Barb. 122. [A mutual insurance company borrowed \$32,000 from different persons and firms and delivered premium notes, indorsed in blank, to T., a member of one of these firms, with the express understanding that he should hold and collect the same for the benefit of, and as trustee for, his firm and the several other firms and persons] : "The plaintiff holds this note as trustee of an express trust. The action was therefore properly brought in his name."—*PER* BARNARD, J.

Boardman v. Beckwith (1865), 18 Iowa 292, 295 : "Appellants complain that they were not allowed to introduce a certain bond for the purpose of showing that one Woodbury was interested in the prosecution of this action, and that he, and not plaintiff, should have brought the same. An examination of the bond satisfies us that the court properly rejected the evidence. That plaintiff held the legal title as against Woodbury (under whom he claims) is beyond doubt. The bond or agreement offered only shows that plaintiff, upon certain terms and conditions, was to account to Woodbury for the proceeds arising from certain lands (including that in controversy) bought for taxes, the full legal title being in plaintiff, who agrees to pay therefor according as the adventure might prove fortunate or otherwise. But there is nothing to indicate that Woodbury retained any part of the legal title. At most, as between them, Boardman [the plaintiff] could only be regarded as the trustee of an express trust; and, as such, he was properly the sole 'plaintiff'."—*PER* WRIGHT, C. J.

Tyler v. Granger (1870), 48 Cal. 259 : "A trustee to whom land is conveyed by a debtor, with power to sell and use the proceeds in payment of the debt and the expenses of the trust, and whose powers and duties are prescribed by a declaration of trust in writing, and who merely holds the title in trust as security for the debt, can not maintain ejectment against the grantor of the trust estate, or his assigns, 'for the manifest reason that the instruments creating the trusts gave him no such right of possession, nor was possession essential or necessary to a full and complete execution of the trust.'"—*PER* SPRAGUE, J.

Lasar v. Johnson (1899), 125 Cal. 549. [Action by the "Subscription Committee," on the following subscription paper, signed by the defendant:

We, the undersigned, do hereby agree to pay the amounts set opposite our respective names to the Subscription Committee of Los Osos Parlor, No. 81, N. S. G. W., on or before March 15, 1896. The money so paid to be used in entertaining delegates to the Grand Parlor of the N. S. G. W. during their stay in the City of San Luis Obispo] : "The subscription was, on its face, made payable 'to the Subscription Committee of Los Osos Parlor,' and the complaint alleges that the plaintiffs constituted said committee, and as such committee entertained said delegates, etc. Trustees of express trusts need not join the *cestuis que* trust as parties, though the title of the cause should state that they sue as trustees of the person or association for whom they are acting. If, however, the body of the complaint shows that they are trustees of an express trust, and for whom they are such trustees (*Spear v. Ward*, 20 Cal. 659; *Wise v. Williams*, 72 Cal. 544, 547), it is sufficient; and these facts appear in the complaint. Besides, the objection should have been taken by demurrer, as the alleged defect appeared upon the face of the complaint."—*PER* HAYNES, C. (p. 555). See also actions by trustees for subscriptions: *Slocum v. Barry* (1864), 34 How. Pr. 320; affirmed 38 N. Y. 46; *Dix v. Akers* (1868), 30 Ind. 431; *Musselman v. Cravers* (1874), 47 Ind. 1. And compare *Presbyterian Society v. Beach* (1878), 74 N. Y. 72.

Clark, as Trustee, v. Fosdick (1889), 118 N. Y. 7. [Action by C., as trustee, to recover an

installment due under articles of separation between the defendant and his wife, afterwards divorced. The articles were entered into by the husband, the wife, and the plaintiff, who, as trustee, was party of the third part. Defendant demurred, on the ground, among others, that there was a defect of parties plaintiff, in that the action was brought by the trustee alone: "By the express terms of the agreement of separation the defendant agrees to pay to the plaintiff for and towards the support and maintenance of defendant's wife, Jennie P., and their children, the yearly sum of \$2,500 for and during the period of her natural life, unless she remarries, etc., and the plaintiff and said Jennie agree that said sum so paid shall be in full satisfaction of the support and maintenance of said Jennie and children and all alimony whatsoever. This clearly constituted the plaintiff the trustee of an express trust, and required that an action to enforce or to execute the trust should be brought in his name."—*Per* POTTER, J., citing Code of Civ. Pro. § 449; *Calkins v. Long*, 22 Barb. 97; *Greenfield v. Mass. M. L. Ins. Co.*, 47 N. Y. 430; *Slocum v. Barry*, 38 N. Y. 46; *Hughes v. Mercantile Ins. Co.*, 44 How. Pr. 351.

People v. Norton (1853), 9 N. Y. 176. [Action upon a bond given "to the people of the State of New York" for the benefit of Henry Lynch and the children of Mary Lynch]: "The next question is whether the bond can be prosecuted in the name of the people, or whether it must be sued in the names of those beneficially interested. . . . The plaintiffs in this case were trustees of an express trust within the meaning of § 113. The duty of holding the bond for the benefit of the children of Mary Lynch appears plainly by the recitals in the bond itself. Money collected on the bond in the name of the people is collected for these children, and a court of equity directs it to be paid as a matter of course. . . . The action, therefore, was rightly brought in the name of the people."—*Per* RUGGLES, Ch. J. So in *Stillwell v. Hurlbert* (1858), 18 N. Y. 374. [To induce a deputy sheriff to sell a wagon taken in execution, and which might belong to one not a party, the plaintiff in the execution gave his bond indemnifying the sheriff "and all and every person and persons aiding and assisting him in the premises." A judgment being obtained against the deputy for the price of the wagon thus sold, the sheriff sued on the bond. It was objected that the suit was wrongly brought]. "In respect to the deputy who held the execution, and who in fact received the bond, the plaintiff became the trustee of an express trust. The obligation was executed to him for the benefit of his deputy. It is the precise case for which provision was made in § 113 of the Code. . . . Without reference therefore to the assignment of the demand to the plaintiff, the action was well brought."—*Per* HARRIS, J. See also *The State*, to use, *v. Moore* (1854), 19 Mo. 369; *Meter v. Lester* (1855), 21 Mo. 112. Compare *Shelby County v. Simmonds* (1871), 33 Iowa 345; *Hunter v. Commissioners* (1860), 10 O. S. 515.

Waring v. Indemnity Fire Ins. Co. (1871), 45 N. Y. 606. [A policy of fire insurance was taken out in their own names by commission merchants on certain goods "their own, or held in trust on commission, or sold, but not removed, contained in bonded warehouse." The goods, after being fully sold and technically delivered, but while not actually removed, were destroyed by fire. The commission merchants sue in their own names for this loss]: "Although the action is in the name of the persons named in the policy, their recovery will be in trust for Bunker Bros. [the purchasers]. *Stillwell v. Staples*, 19 N. Y. 401. Section 113 of the Code declares that the term 'trustee of an express trust' shall include a person with whom or in whose name a contract is made for the benefit of another, and permits an action on the contract to be brought in the name of the trustee. So this action was properly brought in that respect."—*Per* FOLGER, J., p. 613. See also *Protection Ins. Co. v. Wilson* (1856), 6 O. S. 553; *Sturm v. Atlantic Mutual Ins. Co.* (1875), 63 N. Y. 77.

Greenfield v. Massachusetts Mutual Life Ins. Co. (1872), 47 N. Y. 431. [A policy of life insurance was made payable to the "assured, his executors, administrators and assigns," for the benefit of his wife and mother]: "This constituted the personal representatives of the assured the trustees of an express trust within the meaning of § 113 of the Code."—*Per* GROVER, J.

Fidelity & Casualty Co. v. Ballard & Ballard Co. (1899), Ky. ; 48 S. W. Rep. 1074. [The Ballard & Ballard Co. applied for insurance for the protection of its employees, under a "workman's collective policy." Shortly afterwards, and before the written policy was actually issued, one of these employees was killed while in the discharge of his duties. The company sued in its own name at law to recover on the contract of insurance, which was to be in force unless and until the company gave notice of its rejection of the application]: "If the beneficiaries, under the contract, should have been made parties plaintiff, the question should have been raised by special demurrer. Having failed to make the question in that way, the defendant can not now make it. Besides, we are of opinion that the plain-

tiff is the trustee of an express trust, and it is not necessary, under § 21, Civ. Code Prac., to join with it the person for whose benefit the action is prosecuted."—*Per* PAYNTER, J.

Hooper v. Chicago Ry. (1870), 27 Wis. 81. [Action to recover for 100 barrels of flour lost through the defendant's alleged negligence]: "The last position taken is, that the plaintiff was not the owner of the flour at the time of the loss, and can not sue, but that the title was in the consignees, who alone can maintain the action. In *Blanchard v. Page*, 8 Gray 281, it was held, after a most elaborate examination, that the shipper named in a bill of lading may sue the carrier for an injury to the goods, although he has no property, general or special, therein. This, it was held, might be done by force of the original contract for safe carriage made by the carrier with him. Such right of action upon the contract is not affected by the provision of the Code which requires every action to be brought in the name of the real party in interest. The shipper is a party in interest to the contract, and it does not lie with the carrier who made the contract with him to say, upon a breach of it, that he is not entitled to recover the damages, unless it be shown that the consignee objects; for, without that, it will be presumed that the action was commenced and is prosecuted with the knowledge and consent of the consignee, and for his benefit. The consignor or shipper is, by operation of the rule, regarded as a trustee of an express trust, like a factor or other mercantile agent who contracts in his own name on behalf of his principal."—*Per* DIXON, C. J. See also *Waterman v. Chicago Ry.* (1884), 61 Wis. 464, 468; *Wolfe v. Missouri Pacific Ry.* (1888), 97 Mo. 473, 478; Compare *Krulder v. Ellison* (1871), 47 N. Y. 36; *Thompson v. Fargo* (1875), 63 N. Y. 479. See 49 N. Y. 188 and *ante* p. 196; *Swift v. Pacific Mail Steamship Co.* (1887), 106 N. Y. 206; *Ladd v. Arkell* (1874), 37 N. Y. 35, 39.

WEAVER v. THE TRUSTEES OF THE WABASH AND ERIE
CANAL.

SUPREME COURT OF INDIANA, MAY TERM, 1867.

[28 Ind., 112.]

The case came up on appeal from the Tippecanoe Circuit Court. The facts are sufficiently stated in the opinion.

R. P. Davidson, and *W. Wallace*, for appellant.

H. W. Chase, and *J. A. Wilstach*, for appellee.

ELLIOTT, C. J.—Suit by the Trustees of the Wabash and Erie Canal against Weaver, the appellant, to recover assessments on stock subscribed by him in a co-partnership association, known as the "Wabash and Erie Canal Company," organized for the purpose of repairing and maintaining the Wabash and Erie Canal from Terre Haute to the Ohio state line, "as a permanent channel of transportation and inland commerce."

The appellant demurred to the complaint, for the following causes:

"1. There is a defect of parties, in this, that the said Wabash and Erie Canal Company should have been made a party defendant to answer as to its interests in the subject matter of the action."

"2. The complaint does not state facts sufficient to constitute a cause of action."

The demurrer was overruled, and the appellant declining to answer over, final judgment was rendered against him. The ruling of the court on the demurrer raises the only questions presented here.¹

The second ground of demurrer is, that the complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiffs, the canal trustees. And it is insisted that the facts alleged in the complaint do not show that the plaintiffs, in respect to the cause of action, are trustees of an express trust, within the meaning of the code, so as to authorize them to sue for said assessments in their individual or corporate names; nor that they are real parties in interest in the subject of the action.

These questions are certainly not entirely free from difficulty or doubt. The rule at common law required that the action should be

¹ The complaint, as appears from an omitted portion of the opinion, set out at length the following facts:

The Wabash and Erie Canal being out of repair and unfit for navigation, and its board of trustees being unable to make the necessary repairs, certain persons who were interested in the navigation of the canal formed an association for the purpose of making a contract with the trustees to receive the tolls and keep the canal in repair. The members of the association subscribed certain sums, which, by the articles of association, were to be paid in assessments of a certain per cent., upon the call of a board of managers appointed by the association. It was further provided that if the assessments were not paid, *the board of trustees of the canal* should, upon request of the board of managers of the association, sue for such assessments in their corporate name, and hold the same for the use of the board of managers.

prosecuted in the name of the party holding the legal title or interest in the cause of action; but under the code a different rule prevails. Sections three and four of the code provide that "every action must be prosecuted in the name of the real party in interest, except," that, "an executor, administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another."

The New York code contains precisely the same provision. Ours, in fact, is copied from it. And in *Stilkwell v. Hurlbert*, 18 N. Y. 374, in which a deputy sheriff holding an execution took a bond to his principal, conditioned to indemnify the latter and all persons assisting him in the premises, it was held by the Court of Appeals that an action would lie in the name of the sheriff for the benefit of the deputy. HARRIS J., said: "In respect to the deputy who held the execution, and who in fact received the bond, the plaintiff became the trustee of an express trust. The obligation was executed to him for the benefit of his deputy. It is the precise case for which provision is made in the 113th section of the code." And so in *Considerant v. Brisbane*, 22 N. Y. 389, it was held that the agent of a foreign corporation might maintain an action in his own name upon a subscription note payable to him "as executive agent of the company," for stock of the corporation to be issued to the maker of the note, although the plaintiff had no personal interest in the note, on the ground that he was the trustee of an express trust, and could maintain the action under the code.

In both these cases, however, the obligation was made payable to the trustee, and hence they can not be regarded as decisive of the question presented by the case at bar. Here, the obligation to pay the money is found in the agreement of partnership to which those composing the canal company are alone parties, and not in the contract between the company and the plaintiffs. It is the mutual obligation between the members of the canal company, by which each promises to his co-partners that he will pay to the executive committee of the company the assessments that may be made against him upon the amount of his subscription to the capital of the company. But it is further agreed, that in the event that such assessments are not promptly paid to said executive committee, the board of trustees, upon the request of said committee, shall enforce the payment thereof by suit in their corporate name, and hold the money when so collected in trust for the company. And the question still remains, does this provision make the board of trustees of the canal trustees of an express trust, within the meaning of the fourth section of the code, and enable them to enforce the payment of the assessments by suit in their corporate name for the use of the canal company?

An express trust is simply a trust created by the direct and positive acts of the parties, by some writing, or deed, or will. And it is to be observed, in reference to the fourth section of the code, that it does not assume to define the meaning of the term, "trustees of an express trust," in its general sense; it simply declares that those words, within the meaning of the section, "shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." Evidently, this provision was not intended to limit the general meaning of the term "express trust," or to confine the operation of the statute to the particular class of cases referred to, but rather to enlarge its sense by including also that class within it. Here, by the mutual agreement of the members of the canal company, express authority is conferred by their articles of association upon the board of trustees of the canal to enforce the payment of these assessments, upon the request of the executive committee, by suit in their corporate name, in trust for the use and benefit of the company.

The reason for the creation of the trust is obvious. The canal company was organized for the sole purpose of leasing the canal, and obligating the company to put it in proper repair for navigation, and receiving the rents, tolls, and revenues thereof. The condition of the canal was such as to require the expenditure of a large sum of money to render it navigable, which was to be contributed by the members of the company, in proportion to the amount subscribed by them respectively to the capital of the company, and to be paid upon calls of the executive committee. The company was not incorporated, and could not enforce the payment of these calls or assessments by suit in their co-partnership name. The members of the company numbered between three and four hundred persons, scattered over a wide extent of territory, embracing a large number of counties, all of whom must have been made parties to a suit for contribution, and brought before the court. Such a process would unavoidably be so slow, tedious, and expensive as to render it inadequate, if not useless, and greatly tend to defeat the very objects of the organization. Under such circumstances, it was peculiarly proper that the company in its organization, should, if possible, confer upon a trustee the power to enforce the payment of the assessments by a suit in his own name, in trust for the use and benefit of the company. We think the authority conferred on the trustees of the canal constituted them trustees of an express trust within the meaning of the code.

We are also of opinion, that the power thus conferred on the board of trustees of the canal was coupled with an interest in them, in their trust capacity. A former company had contracted to keep the canal in repair for navigation, and had done so until the spring of 1866, when it sustained such material injury by floods as to render it unfit for navigation, and to require in its repair an expenditure of a much larger sum of money to fit it for navigation than the company had derived

from its tolls and revenues, or than the members thereof were willing to advance from their private means. It was the duty of the trustees, under their trust, to keep the canal in navigable order and repair, if it could be done by its tolls and revenues, but they did not possess the means, belonging to the trust, sufficient to repair the injuries to it caused by the floods of that year. Merchants, tradesmen, and others, residing at different places along the line of the canal, and especially those engaged in trade and commerce, were greatly interested in its repair. The former company agreed to surrender their contract with the trustees, and the new company was organized with a large capital for the sole purpose of procuring a contract from the trustees for the repair of the canal, and the advancement of the means necessary for that purpose, in consideration that they should receive the tolls and revenues of the canal to reimburse them for the expenditures so made. It is apparent, both by the partnership agreement and the contract between the company and the trustees, that it was intended that the company should advance the necessary amount to put the canal in repair, and it may fairly be inferred that the contract was made with a direct reference to the provisions in the articles of partnership conferring on the trustees the power to enforce assessments for repairs, by suit in the corporate name, and that it formed one of the inducements to the contract on their part, as the means by which they would secure the repair of the canal. It, in effect, forms a part of the contract to which the trustees are parties, and in which they have an interest.¹

We think the court committed no error in overruling the demurrer to the complaint, and that the judgment should be affirmed.

The judgment is affirmed with costs.

BROWN v. CHERRY.

SUPREME COURT OF NEW YORK, GENERAL TERM, OCTOBER 6, 1868.

[56 Barb. 635.]²

The action was to restrain the defendant from foreclosing a mortgage, executed by the plaintiff, of which the defendant was the holder.

It appeared on the trial, that in 1853, one Mrs. Stewart was the owner of personal property which had been transferred to her by her husband before their marriage; that she sold it to John Langdon; and that Langdon, in consideration thereof, transferred the title to the real estate in question to the plaintiff, Brown, by deed absolute in form, and without the then knowledge of Brown, which deed from Langdon to Brown

¹ Part of the opinion, on another point, is omitted.

² S. C., 38 How. Pr. 352.

was intended for the benefit of Mrs. Stewart, she being aware that the conveyance was to be made to Brown, but unaware of the form in which the conveyance was to be made.

On the 1st of May, 1858, Brown executed and delivered to Mrs. Stewart his promissory note for \$300, for the premises, payable at ninety days, but he never paid it, and was never called upon to do so. He never entered into the actual possession of the premises, and had nothing to do with the care or use of them, and considered that he held them for the benefit of Mrs. Stewart.

On the 29th of December, 1857, Brown executed a mortgage on the premises to one Chauncey W. Cherry, to secure the payment to him of the sum of \$1500, in five years from the 13th of May, 1858, with annual interest, and without any bond collateral thereto, or covenant for the payment by him. At the time he executed the mortgage, he was requested to do so by Mr. Stewart, the husband of Mrs. Stewart, and he supposed that he executed it for the parties beneficially interested in the premises, but he received no consideration for the mortgage, whatever. The proof showed that Mrs. Stewart did not authorize the giving of the mortgage, and did not know of its execution until a long time afterwards; and there was no proof that there was any consideration whatever for the execution of it.

It further appeared that during all the time after the deed from Langdon to Brown was executed, Alpheus Stewart, the husband of Mrs. Stewart, had possession and charge of the premises. The referee also found, "that the plaintiff claimed to prosecute the action for the benefit of Mrs. Caroline Stewart, wife of Alpheus Stewart"; but no such claim was made in the complaint, nor does it so appear from the case, further than from the facts above stated.

On the 6th of August, 1861, Chauncey W. Cherry assigned the mortgage to Ira Hopkins, who, by his last will and testament bequeathed it to his daughter, the defendant. After his death, and at the time of the commencement of the action, she was proceeding to foreclose it by advertisement, pursuant to the statute, for the whole amount of the principal, and for the whole amount of interest thereon, none having ever been demanded or paid.

There was no objection taken that any other person or persons were not joined with the plaintiff as parties to the action, either by demurrer or answer.

At the close of the trial the plaintiff's counsel asked the referee to find and decide, "1st. That the plaintiff having executed and delivered the mortgage in question to Cherry, the plaintiff can maintain this action to set it aside for want of consideration, without joining the person having the equitable interest in the lands so mortgaged, 2nd. That the objection of non-joinder of said person as a party plaintiff not having been taken, either by demurrer or answer, is waived."

The referee refused so to find, to which the plaintiff excepted; and the referee dismissed the complaint, "on the ground that the plaintiff was not the real party in interest, nor the trustee of an express trust." To this decision the plaintiff's counsel excepted.

Judgment was entered for the defendant, pursuant to the report, and the plaintiff appealed.

Hunt & Green, for the appellant.

Henry Reigel, for the respondent.

FOSTER, J.—We must assume, for the purpose of deciding the questions before us, not only, as the referee has found, that the plaintiff received no consideration for the execution of the mortgage, but also that it was without consideration to Mrs. Stewart; for if that would give the plaintiff any more right to bring this action than if she did receive a consideration, it was the duty of the referee to find and declare how the fact was, instead of refusing to find it, on the ground that it was immaterial.

But upon the supposition that the plaintiff was not a trustee of an express trust, was the fact of such want of consideration to her immaterial?

Upon the proofs in the case, the plaintiff, although he supposed he was acting for the benefit of Mrs. Stewart, in executing the mortgage, executed it, in fact, without her knowledge or authority, and without consideration to her. He held the legal estate in the premises, and there was nothing in the conveyance to him which would give notice to any one that he held it only in trust; and there can be no doubt, I think, that a foreclosure against him by advertisement, pursuant to the statute, if the sale were regular and completed to a purchaser for value, without notice, would cut off the equity of Mrs. Stewart, although no notice of the proceeding were served upon her. Great injustice would ensue, if parties were allowed to hold the beneficial interest in land, under deeds to other persons, purporting to be in fee simple, against encumbrances placed upon it by the grantee, in favor of persons who had no notice of the secret trust, and equal injustice if, upon the statutory foreclosure of any mortgage executed by the secret trust, in his own name, such trust could prevail against a purchaser at the mortgage sale, in good faith and for a valuable consideration. And it is clear from the language of the statute, that upon the foreclosure in question no notice to Mrs. Stewart was necessary. 2 R. S. 778, § 3, subd. 4, 4th ed.

Suppose, then, the plaintiff had not commenced this action, to restrain the statutory foreclosure, and a sale of the premises, regular in form, had been made to a purchaser for valuable consideration and without notice; would not the plaintiff be liable to Mrs. Stewart for the loss she sustained by his wrongful mortgaging of the premises, and would it be any answer to such alleged liability that he honestly supposed that he was acting for her when he executed it? I

think not, and that he had such a pecuniary interest in the question, for that reason, as authorized him to bring the action; and the referee erred in refusing to find that the mortgage that was executed without the knowledge of Mrs. Stewart, and without consideration to her.

Again, was the referee right in holding that the plaintiff was not the "trustee of an express trust"? It is claimed by the counsel for the defendant that the trust in question was a resulting trust, instead of an express trust; but, I think, without sufficient ground for such claim. A resulting trust hardly ever arises from acts which show that the trustee and the *cestui que trust* concur in the creation of it; and it is well illustrated by the case of a purchase by one, in his own name, of property, with the funds which he has in his hands, belonging to another, to be applied to some other purpose, or where he has such funds in his hands for the purchase of a particular piece of real estate, for and in the name of his principal, and he, in violation of his instructions, makes the purchase and takes the absolute legal title to himself. In such cases there is a resulting trust in favor of the person whose funds have been used by the grantee. Such was not the case here. The principal knew that the deed was to be taken in the name of Brown, though she did not know what the form of the deed would be.

It is what, at common law, was an implied trust, and it is technically so still; and it must be conceded that it was not an express trust at common law. "Express trusts are those which are created in express terms in the deed, writing, or will, while implied trusts are those which, without being expressed are deducible from the nature of the transaction, as matters of intent; or which are superinduced upon the transaction, by operation of law, as matters of equity, independently of the particular intention of the parties." Bouvier's Law Dic., tit. Trust.

Neither was it what is termed an express trust in the Revised Statutes. 1 Stat. at Large, 768, § 55, et seq. Nor is it to my mind certain that it was so according to section 113 of the Code of Procedure, as originally enacted, which was perhaps intended to embrace such as were express trusts, at the common law, and by the several statutes, and was as follows: "An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute may sue without joining with him the person for whose benefit the action is prosecuted." And yet upon the authority of *Grinnell v. Schmidt*, 2 Sandf. 706, decided in May, 1850, there would seem to be no doubt that it was.

In 1851, section 113 of the Code was amended, by adding at the end of it the following words: "A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another." Now the plaintiff not only held the legal title to the land in

his own name, for the benefit of another, but the very mortgage in question was executed by him, in his own name, not for his own benefit, but for the benefit, as he supposed, of his *cestui que trust*.

And it seems to me that this case comes, not only within the spirit of the amendment of 1851, but within its letter. "A factor or other mercantile agent, who contracts in his own name, on behalf of his principal, is a trustee of an express trust, within the meaning of section 113 of the Code, and is the proper party to bring an action upon the contract." *Grinnell v. Schmidt*, 2 Sandf. 706. And the Court, at page 709, say: "It has been generally supposed that the words, express trust, in this section, refer to trusts of land, authorized by the Revised Statutes, and which are, in the statutes themselves, termed express trusts, and to them alone. It is not necessary, however, to give to the words this restricted meaning. They are capable of a more extensive signification, so as to include all contracts in which one person acts in trust for, or in behalf of, another. Of this kind are contracts made by factors and other mercantile agents, who act in their own names, but for the benefit of, and without disclosing their principals." And it would seem that the amendment of 1851 was intended to give the original section, in express terms, the same construction which had been given it by the Superior Court.

In *Rowland v. Phalin*, 1 Bosw. 43, it was decided that as to a contract made by a party of the first part, assuming to act in behalf of others not named, and to bind himself personally to accomplish certain results, beneficial to the parties of the second part, in consideration of their agreement to pay him, for the benefit of those for whom he acts, the party of the first part is "a trustee of an express trust," within the meaning of section 113, and may sue in his own name, without joining with him those for whose immediate benefit the action is prosecuted. It has also been held that a mere agent, who contracts in his own name, and without disclosing the name of his principal, is a trustee of an express trust, and may maintain an action upon the contract, in his own name, without joining his principal; and it is also held that in such case the principal also has the right to sue without joining the agent with him.¹

An auctioneer who sells goods in his own name, to a third person, is the trustee of an express trust, within the meaning of the section in question, and may sue upon the contract, without an assignment of the cause of action. And he is not bound to show that he was a licensed auctioneer. He sues under the statute as a "trustee of an express trust," having made a sale of goods for the benefit of another. *Bogart v. O'Regan*, 1 E. D. Smith, 591.

In *Minturn v. Main*, 3 Selden, 220, it was decided that a public auctioneer who sells goods for another may maintain an action for the

¹ Citing *Morgan v. Reid*, 7 Abb. 215. The *Union India Rubber Company v. Tomlinson*, 1 E. D. Smith, 380. *Van Lien v. Byrnes*, 1 Hilt. 133.

price, although he has received his advances and commissions, and has no interest in the property or its proceeds. And the Court in its opinion, at page 224, says: "There are two considerations which are conclusive against the defendant; one is, that an auctioneer has such a special property or interest in the subject matter of the sale, that he may sue in his own name, unless the principal or real owner elect to bring the action in his name. Chitty on Cont. 185. And it is not necessary to prove that he has a special property or interest, for that flows as a matter of course from his position as an auctioneer, and it is only where a party acts as a mere agent or servant that a special beneficial interest must be proved to maintain an action, or may be disproved to defeat it. The other is that the defendant is estopped from denying that he contracted directly with the plaintiffs by receiving the goods from them, giving his receipts to them, as if on a purchase made by him of them, and by his subsequent recognition of the whole transaction as a sale directly from them to him. He treated the transaction throughout as a sale from them to him, until he obtained possession of the property and appropriated it to his own use, and it no longer lies in his mouth to refuse that character to it."

These remarks are all applicable to this case. In that case the auctioneer had no possible interest in the proceeds of the sale, except it be that they were answerable over to their principal therefor. They had received their charges and commissions. And yet they were held to be entitled to sue because they had an interest in the subject matter of the suit. Certainly, if I am right in supposing that the plaintiff in this case would be answerable over to Mrs. Stewart, if he had permitted the unauthorized mortgage to be foreclosed, he has as much interest in this action as the auctioneers had in that. And the estoppel on the defendant is here quite as strong; for the defendant, or the mortgagee, under whom she claims the mortgage, contracted with the plaintiff as the party in interest; took the mortgage from him in his own name, and afterwards instead of proceeding to foreclose it by action, he did so by advertisement, and treated the plaintiff as the only person who had any title to the premises. He is foreclosing against him as the party interested, and he should not be allowed when it turns out on the trial of the action which was commenced by the plaintiff to stop his proceedings, to turn round and insist that his mortgagor has no interest in the question, whether he be a trustee of an express trust or not.

But I think, upon the authority of the case of *Considerant v. Brisbane*, 22 N. Y. Rep. 389, there can be no question that the plaintiff was a trustee of an express trust within the meaning of section 113 as it now stands.¹

That Mrs. Stewart was not made a party, furnished no good reason for the dismissal of the complaint. It is enough for the pur-

¹ Part of the opinion, quoting from *Considerant v. Brisbane*, is omitted.

poses of the plaintiff on this appeal, if it appears that he was entitled to commence the action, alone, or in conjunction with Mrs. Stewart. If he had a standing in Court, in either way, upon the pleadings, in this case, the complaint could not be dismissed. For, if Mrs. Stewart should have been a party plaintiff with him, the defendant, if he would raise the question, should have claimed it in her answer, and could not ask a dismissal for that reason on the trial. She could not demur to the complaint, for that contained a good cause of action, and there was no statement in it to show that any one besides the plaintiff had any interest in the controversy. She must therefore have claimed the misjoinder by setting up the facts on which she relied for that purpose, and making the claim in the answer, and by not doing so, she waived it.¹

I am clearly of the opinion that the plaintiff had the right to commence the action as he did, and if the defendant would insist that Mrs. Stewart should have been a party, in order to a full and final disposition of the controversy, he should have taken the proper steps for that purpose. And if it appeared on the trial that a complete determination of the controversy could not be had without the presence of Mrs. Stewart, the court should have caused her to be brought in, pursuant to section 122 of the Code.

The judgment should be reversed, and a new trial granted, with costs to abide the event.²

MULLIN, J., concurred.

MORGAN, J., dissented

New trial granted.

¹ *Citing* Code, § 148. *Merritt v. Walsh*, 32 N. Y. Rep. 685. *Hosley v. Black*, 28 id. 438.

² This cause came again before the General Term in 1871, *Brown v. Cherry*, 59 Barb. 628, and it was decided that the case was within section 51 of the New York statute of Uses and Trusts (1 R. S. 728), declaring that where a grant for valuable consideration shall be made to one, and the consideration paid by another, no trust results in favor of the latter, but the title vests in the former. Accordingly, the referee's dismissal of the complaint was sustained. On appeal this was held to be error. "The case came within the exception contained in section 53 of the said statute; and the conveyance, if made as directed by her, although ineffectual as a trust, would have vested the estate in herself; and she was therefore not estopped from claiming her interest in the mortgaged premises." *Brown v. Cherry* (1873), 57 N. Y. 645, 646. —Ed.

SCANTLIN v. ALLISON AND ANDERSON.

SUPREME COURT OF KANSAS, JULY TERM, 1873.

[12 Kan. 85.]

Action on three promissory notes payable to James B. Allison and John N. Anderson, plaintiffs below. Scantlin, the maker of the notes, answered, first, that the plaintiffs were not the real parties in interest; second, that the consideration of the notes had failed; and third, damages for the breach of covenants of seizin in a deed of land sold by plaintiff to defendant, and for the purchase-money of which land the notes were given. The plaintiffs had judgment for the full amount of the notes; Scantlin brings the case here on error.

Richardson & Jones and *W. D. Webb*, for plaintiff in error.

Killey & May, for defendants in error.¹

VALENTINE, J.—George Allison in his lifetime executed a will devising and bequeathing all his real and personal property to his five children, in equal shares. He also willed that said property should be sold whenever a majority of his heirs desired the same to be done. But as to how it should be sold, or who should sell it, or who should receive, take charge of, or distribute the proceeds thereof, he made no provision. He appointed James B. Allison, who was also an heir and devisee, and John N. Anderson, executors of his last will and testament, and guardians for two of his children, who were then minors. After the death of George Allison, his will was duly probated, and James B. Allison and John N. Anderson were duly qualified as executors.

Afterward all the heirs except one, who was still a minor, and both the executors, united in selling the real estate to Samuel Scantlin, and executed to him therefor a general warranty deed, with certain special covenants, among which was the covenant that the grantors had "good and lawful authority to sell and convey the same." The executors also attempted to transfer to Scantlin the interest of the minor heir by executing for him the said deed of conveyance. In consideration of this deed, and the land thereby conveyed, Scantlin gave certain promissory notes payable to James B. Allison and John N. Anderson, and payable to them alone, and payable to them as individuals, and not payable to them as executors, guardians, or trustees. When these notes became due, James B. Allison and John N. Anderson sued Scantlin on the same in their own names, individually, and without joining with them any of said heirs as plaintiffs. The plaintiff in error (defendant below) claims that the plaintiffs below should have brought their action in their representative capacity, as executors or guardians, and not in their own individual names.

¹ The arguments are omitted.

We think, however, that the action was rightly brought. It is true that the money due on the notes belonged to the heirs; but the notes were made by consent of all parties interested therein to the plaintiffs in their individual names, and not to the heirs, or to the plaintiffs in their representative capacities. The plaintiffs were not designated in the notes as executors, or guardians, or even as trustees; and while it is true that the plaintiffs hold the notes as trustees for the heirs, it can hardly be said that they hold them as either executors or guardians. Section 28 of the civil code provides that "a person with whom or in whose name a contract is made for the benefit of another may bring an action without joining with him the person for whose benefit it is prosecuted;" and § 9 of the act concerning trusts and powers (Gen. Stat., 1097,) provides that "no person who shall in good faith pay money to a trustee authorized to receive the same shall be responsible for the proper application of such money; nor shall any right or title, derived by him from such trustee, in consideration of such payment, be called in question, in consequence of misapplication by the trustee of such money." Under these statutes there can be no reason why the action should have been brought differently from what it was brought; and under these statutes, and the common law, the action was rightly brought.¹

HAYS ET AL. *v.* GALION GAS LIGHT & COAL COMPANY.

SUPREME COURT OF OHIO, DECEMBER TERM, 1876.

[29 O. S. 330.]

Error to the District Court of Crawford County.

The original action was brought in the common pleas by William Hays as trustee, against the Galion Gas Light and Coal Oil Company, Martin Sponhauer, William Fail, Thomas B. Burgert, Otho L. Hays, Joseph Kesselmeier, Asa C. Squires, and William H. Holmes, defendants, to foreclose a mortgage. The petition stated that the defendant, the Galion Gas Light and Coal Oil Company was a corporation organized and incorporated in 1859, under the laws of the state; that on the 1st day of January, 1862, being largely in debt and in great need of money, and for the purpose of raising money to pay its debts, and to enable it to manufacture and furnish gas, the company made and delivered to the plaintiff its sixty-five promissory notes, each for the sum of \$100, each bearing interest at six percent, payable semi-annually, January 1st and July 1st of each year. The notes,

¹ Parts of the opinion, on other points, are omitted.

The cause was remanded with an order that the judgment be modified because of, and to the extent of, a partial failure of consideration in the deed to the defendant, arising out of the fact that the minor's interest had been sold without an order of court. —Ed.

with coupons representing the interest, were numbered from 1 to 65 inclusive, and were payable to William Hays or bearer. A mortgage to secure the payment of the notes and interest was executed by the company to William Hays, on the corporate property described in the petition. The mortgage was in the ordinary form of a mortgage given to secure payment of a debt to the mortgagee, not expressing upon its face that it was given to William Hays as trustee.

The plaintiff alleged that the notes and the mortgage securing the same were made to him as trustee, and not as owner, and that he prosecuted the suit for the benefit of the holders of the notes; and that notes Nos. 1, 2, and 3 were held by the defendant William Fail, No. 6 by the defendant Martin Sponhauer, and all the others by the defendant Otho L. Hays; that demand of the interest due was made at the banking house named, and refused, more than ninety days prior to the commencement of the action. The other defendants claimed some lien on the mortgaged premises. Copies of the notes and mortgage were attached as exhibits, and made part of the petition. The prayer was for foreclosure of the mortgage, and that the proceeds of sale might be divided among defendants entitled to receive them, and for other equitable relief.

On the same day that the petition was filed, the defendants Fail and Otho L. Hays, each filed an answer and cross petition claiming to own, respectively, that part of the debt of which they were alleged by the petition to be the owners, stating facts showing the debt was due by reason of the failure of the company to pay the interest due within ninety days after demand, and praying judgment and foreclosure of the company's equity in the mortgage. To the petition of the plaintiff—but not to either cross-petition—the company demurred, on the ground that it did not state facts sufficient to constitute a cause of action. The defendants, Sponhauer, Squires, and Riblet, demurred to the answer and cross-petition of Otho L. Hays, on the ground that the facts stated were insufficient to constitute a cause of action, or defence, or counter claim. This demurrer was also overruled, and no issue of fact being tendered by answer, the court gave judgment to Fail and Otho L. Hays for the amounts due them respectively, and ordered, in default of payment of the judgments within ten days from the rising of court, a sale of the mortgaged property. The company carried the case to the district court, where the judgment of the common pleas was reversed.

Otis, Adams & Russell, for plaintiffs in error.

S. R. Harris, for defendant in error.¹

BOYNTON, J.—The record discloses the fact that the district court reversed the judgment of the common pleas, and sustained the demurrer to the petition, on the ground that "said petition shows that the said defendant in error, William Hays, has no interest whatever in the notes and mortgage mentioned in said petition."

¹ The statement of facts is slightly abridged; the arguments are omitted.

It is proper to state that no judgment was rendered in the court of common pleas in favor of William Hays upon the notes, the judgment rendered being in favor of Otho L. Hays and William Fail on their respective cross-petitions.

The position assumed as a predicate for reversal must have been, in accordance with what is now claimed by the defendants, that these judgments were improperly rendered, because the defendants for whom they were rendered were not properly in court, inasmuch as the petition did not state a cause of action in favor of the plaintiff, William Hays.¹

Was the action in the common pleas properly brought in the name of William Hays as trustee? The petition alleged the fact to be that the company was largely in debt and in great need of money, and that for the purpose of raising money to pay its debts, and to enable it to manufacture and furnish gas, it executed and delivered the notes and mortgage to the plaintiff; that the notes and mortgage were made to him as trustee of the holders of the notes, and not as owner; and that the action was brought for their benefit. These allegations, upon demurrer, must be taken as true; and so taken, the question presents the ordinary case of a corporation in need of money to carry forward the legitimate business for which it was created, issuing its notes or bonds therefor to a trustee, and securing their payment by mortgage to him of the corporate property, other than its franchises. The trustee in such case is usually, if not always, selected and appointed by the company for the convenience and benefit of itself, and of those who may become the owners of its obligations. One mortgage to the trustee is all that is required, no matter how numerous the holders of the notes or bonds secured thereby. He is the representative of the common interests of all who may invest in the security. The right of the owner of the debt secured by the mortgage to be represented by him gives additional value to the security, and facilitates the collection of the debt upon its maturity, and consequently enables the company the more readily and easily to realize and obtain the loan desired. It is not infrequently the case, especially in the business of great corporations, that the holders of the bonds are so numerous that it would not be merely inconvenient, but utterly impracticable, to bring them all before the court in a proceeding to foreclose the equity of redemption. Doubtless this is one of the considerations that gave rise to the rule held in *Coe v. The Columbus, Piqua and Indiana R. R. Co.*, 10 Ohio St. 372, that the bondholders, when numerous, were, in an action for foreclosure, neither necessary nor proper parties.

It is, however, said by counsel for the defendant that the plaintiff below was not a trustee of an express trust, nor a person with whom or in whose name the contract was made for the benefit of another, and that the plaintiff made no such allegation; and that, if he did, the

¹ Part of the opinion is omitted.

written instruments would contradict him. The last clause of this proposition is not correct, and the first begs the very question at issue. The vice of the argument consists in the supposed necessity that the notes or mortgage should contain upon their or its face the evidence of such trust. It is true that it does not affirmatively appear upon the face of the notes or mortgage, that William Hays was a trustee for the holders of the notes; nor does it appear that he was not such trustee. If it is necessary that such trust should have been declared in writing, which question we do not decide, it nowhere appears that it was not so declared. If required to be in writing, it was not necessary that the notes or mortgage should contain the evidence of the trust. *Non constat*, that some other instrument in writing, properly executed, did not fully evidence the appointment of the trustee and define his duties. The fact stated in the petition, that the notes and mortgage were made to him as such trustee, presupposes or implies the antecedent existence of whatever was legally necessary to constitute him such trustee. Being, therefore, a trustee for the purpose alleged, he was clearly a proper if not a necessary party. He was either a trustee of an express trust, as that term is used in section 27 of the civil code, or he was a person with whom, or in whose name, a contract was made for the benefit of another; and in either case, he is expressly authorized to maintain the action. He is more than a mere mortgagee, holding the naked legal title to the mortgaged property. He not only holds the legal title, under which he could maintain an action to recover the possession, upon condition broken, of the property mortgaged, but he has been, by the agreement of the parties, constituted a trustee, and as such, presumptively clothed with the requisite power to act for the holders of the notes, and as the representative of their interests, in an action to collect the debts when matured. Whether the owners of the debt, or beneficiaries under the trust, are numerous or not, he may so act or sue without uniting with him those for whose benefit the action is prosecuted.¹ "The only concern of the company, after the amount due upon the security has been ascertained, is that at the time, or before any payment has been made, the bonds should be produced and canceled, if paid in full, or credited on their face with the amount paid. It would be the duty of the court to secure this protection against further liability to the company."²

Had the sixty-five promissory notes in the present case been owned by sixty-five different persons instead of three, and the owner of one had brought an action to foreclose, making the remaining sixty-four parties defendant, the very necessity of the case, if the claim of the defendant is well made, would have required sixty-four cross-petitions in that action. To avoid this very condition of things, by providing adequate means of relief to all the parties in interest by an action

¹ Code, § 27, *Coe v. The C. P. & I. R. R. Co.*, 10 O. S. 372; *Pom. on Remedies*, § 174.

² *Coe v. C. P. & I. R. R.* (1859), 10 Ohio St. 372, 410.

less cumbersome and less expensive in the name of a common trustee, was a leading object of the provisions of the code regulating parties to a civil action.¹

*The judgment of the district court is reversed and that of the common pleas affirmed.*²

SNIDER v. ADAMS EXPRESS COMPANY.

SUPREME COURT OF MISSOURI, APRIL TERM, 1883.

[77 Mo. 523.]

This was a suit by Henry J. Snider to recover damages for failure to deliver money alleged to have been placed in the care of the express company for transportation.

At the trial plaintiff gave evidence tending to show that, as agent for his brother Andrew Snider and his sister Louisa J. Snider and several other persons, he sold a tract of land and received the purchase money; that he divided this money according to the interest of each, put the share of each into an envelope by itself, marking the envelope with the name of the owner, and placed them all in a large envelope; that he then deposited the latter with the express company

¹ A part of the opinion, discussing the corporate power of the gas company to mortgage its property, and the execution of the mortgage, is omitted.

² Compare *White, Trustee, v. Allatt* (1890), 87 Cal. 245. [Action to foreclose a mortgage given to secure the payment of three promissory notes.] Said the Court, *per GIBSON, C.* (p. 246): "The complaint alleges that the three notes set out in it were made and delivered to the plaintiff, by the defendants, together with the mortgage in suit to secure their payment, and that the plaintiff is the owner and holder of the notes and mortgage *as trustee for the beneficiaries*, 'all the heirs at law of B. F. White, deceased,' while the notes themselves show that they were made to the plaintiff 'as trustee of the estate of B. F. White, deceased.' These two allegations are said to be inconsistent, because the identity of the plaintiff, as trustee for several particular persons described as heirs at law of B. F. White, deceased, is different from that of trustee of the estate of the same decedent.

"But this inconsistency is more apparent than real. It is true that in the latter capacity, if he were trustee of the whole estate, he would not only represent the heirs, but the legatees, devisees, and creditors, if any, as well; while in the first mentioned capacity, he would simply represent the persons named as beneficiaries. This makes it appear that the first allegation is more extensive in scope than the second, and that it is not repugnant to the latter. The notes sued on are, however, the principal contract, to which the mortgage is but an incident; and as it clearly appears, from the notes themselves, that they were made to the plaintiff for the benefit of 'the estate of B. F. White, deceased,' he must be regarded as a trustee for that estate. These facts are material and controlling, in view of which, the averment of ownership of the notes and mortgage as trustee of the heirs of said decedent becomes immaterial and redundant matter, and as such, must be disregarded.

"By taking the notes and mortgage in his own name, for the benefit of the estate of the decedent above named, he became the trustee of an express trust, and, as such, may maintain this suit, without joining with him the persons for whose benefit the action is prosecuted. *Code Civ. Pro.*, § 369; *Bliss, Code Pleading*, § 262; *Schouler, Executors and Administrators*, § 292; *Pomeroy, Remedies and Remedial Rights*, § 175. This is one of the exceptions to the rule, declared in § 367 of the Code of Civil Procedure, that every action must be prosecuted in the name of the real party in interest."

—Ed.

with directions to deliver the same to said Andrew Snider, taking a receipt in the usual form and paying charges of transportation with money reserved out of the fund; that all the beneficiaries lived in the same town; that the package was duly delivered to the said Andrew, but upon being opened the envelope containing the share of said Louisa was found to be missing. This was the money sued for.

The court sustained a demurrer to this evidence, and plaintiff took a non-suit with leave to move to set the same aside. In due time this motion was made and overruled, and plaintiff brought this appeal.

E. E. Kimball and E. J. Smith, for appellant.

*Blair & Perry, for respondent.*¹

SHERWOOD, J.—The controlling question in this case is, whether the plaintiff is the proper party to sue, the answer denying that he is the proper party.

It is quite clear from the testimony, that the plaintiff was acting as the agent of his sister, Louisa J. Snider, in collecting and forwarding the money arising from the sale of her interest in the land. The contract with the defendant company, for the transmission of the money, for the loss of which suit is now brought, was made by plaintiff, in his own name, without mention of any one as beneficiary of such contract. If so, then it was competent for the agent, with whom the contract was actually made, to sue in his own name, or for his undisclosed principal, with whom in point of law the contract was made, to sue in her own name.²

In *Blanchard v. Page*, 8 Gray, 281, the same view as that just announced is stated, and it is there held, after an extensive and elaborate review of the authorities, by Shaw, C. J., that a consignor was a proper party to sue, though having neither a general nor special property in the goods.

But it is urged that under the Code the action must be "prosecuted in the name of the real party in interest." R. S. 1879, § 3462. But there are exceptions to this rule, expressly made in the section quoted, and set forth in the section following. Among those exceptions is that of a trustee of an express trust, who may sue in his own name, without joining with him the person for whose benefit the suit is prosecuted. In the language of the section referred to, "a trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another."

It is claimed by counsel for defendant that there is no express trust in the case, because such trust must point out with precision the subject, the persons, and the purposes of the trust, can not be proved

¹ The arguments are omitted.

² *Citing*, *Cothay v. Fennell*, 10 B. & C. 671; a. c., 21 E. C. L. 145; *Story on Agency*, §§ 160, 270, and cases cited; *Ferris v. Thaw*, 72 Mo. 445.

by parol, and can only be manifested or proved by some writing. Whatever of truth there may be in this position regarding trusts as to realty, it is not true regarding personal property; for such property is not within the terms of the statute, and such trusts, consequently, may be declared and proved by parol. The point has been so decided inferentially in England, and directly decided in this way in this country. 1 Perry on Trusts, § 86, and cases cited.

But we need not search the text books in the endeavor to maintain in the present instance that the plaintiff is the trustee of an express trust, since, under the terms of the statute, the circumstances of this case endow him with all the attributes pertaining to that character: (1) He is the person with whom, or in whose name, the contract now in suit was made. (2) He made the contract for the benefit of another, as shown by the evidence adduced.

It was held at an early day in this State, that a party to whom a note had been assigned merely for the purpose of collection, was the "real party in interest," within the meaning of the statute; that the assignment created in the assignee the legal interest, and thereby he became the proper party to sue. *Webb v. Morgan*, 14 Mo. 429. This ruling was followed in the similar case of *Beattie v. Lett*, 28 Mo. 596, where the one just mentioned was approvingly cited and followed, and the remark made that the assignees had the right to maintain an action on the note in their own names, "because they were the trustees of an express trust, and had the legal title to the note." So, also, in *Simmons v. Bell*, 35 Mo. 461, in similar circumstances, the above case was cited with approbation; and in *Nicolay v. Fritschle*, 40 Mo. 67, where it was held that though the sum mentioned in the note was not due the plaintiff, yet that he, being the payee mentioned therein, having possession of the notes and the legal title thereto, had such an interest as authorized him to sue; that if the notes were impressed with a trust in his hands, that trust could subsequently be asserted; that the fact that such a trust existed constituted no defence to the action; and that a judgment was properly rendered as if for want of an answer, where the answer set up the facts aforesaid.

Now, if a contract originally made in the name of another, by an assignment thereof, which confers no beneficial interest—which makes the party to whom made the mere naked depository of the legal title—can endow the assignee with rights as the real party in interest, can clothe him with the attributes of a trustee of an express trust, assuredly a party with whom, and in whose name, the contract was originally made, for the benefit of another, should encounter no legal obstacle in maintaining an action in his own name on the contract thus made. And so the point has been ruled; as in the case where a written contract was made with an administrator of an estate, and upon his resignation as such, action being brought by the administrator *de bonis non*, it was ruled that under the new code of

procedure, the contract, if made with the original administrator for the benefit of the estate, he, as the trustee of an express trust, was the proper party to sue. *Harney v. Dutcher* [1851], 15 Mo. 89. And in *Rogers v. Gosnell*, 51 Mo. 466, it was held, that under the statute the party in whose name the contract was made, for the benefit of another, might maintain action upon it, being the trustee of an express trust, and that the beneficiary might, also, do the like, as a recovery by either would be a bar to another action by the other.¹

It only remains to say that the plaintiff can maintain his action. Therefore, *Judgment reversed and cause remanded.*²

All concur.

¹ See also, Bliss on Code Plead., §§ 45, 46.

² See also *Arcade Hotel Co. v. Wiatt* (1885), 1 Ohio C.C. 55. [W., while a guest at a hotel, deposited with the clerk \$2,195 for safe keeping. The clerk fled with the money. The hotel company refused to reimburse W. He sued in his own name as owner. It appeared that the money was in his possession as trustee and not in his own right. There was nothing in writing evidencing a trust. The defendant insisted that W. could not sue under the code.] Said the Court, per Cox, J.: "It is claimed that to constitute an express trust there must be an instrument in writing declaring the trust. But this is not required in this state. The authorities are numerous, that an express trust can be created by parol. 'A deed absolute on its face may be shown in fact to be a trust by parol.' *Mathews v. Leaman* [1874], 24 O.S. 623. [Compare Perry, *Trusts*, § 78 et seq.]

"Authorities are cited to show that when an agent has lost or deposited money or other property, an action to recover the same may be brought in the name of the principal. There is no doubt of this proposition, and when the agent, or party, or possessor, brings his suit, the real owner is the real party to this extent, that any offset or claim in the funds which the defendant may have, may be worked out against him through the agent. But this right of the principal to sue is for him to assert, and not for a third person.

"The general rule is well stated by BAYLEY, J., in *Sargent v. Morris* [1820], 3 Barn. and Ald., 277, 280, as follows: 'Now, I take the rule to be this; if an agent acts for me and on my behalf, but in his own name, then, inasmuch as he is the person with whom the contract is made, it is no answer to an action in his name, to say, that he is merely an agent, unless you can show, also, that he is prohibited from carrying on that action by the person in whose behalf the contract was made. In such cases, however, you may bring your action, either in the name of the party by whom the contract was made or of the party for whom the contract was made.' Our code is substantially the adoption of this principle.

"In *Nixon v. Nixon*, 21 O.S. 114, where a party contracted to deliver from fifty to one hundred hogs, and, on bringing suit to recover for the value, it appeared that he only owned thirty-nine of them, the rest belonging to other parties, the court say: 'If the plaintiff had the right to tender the hogs, on the contract, so that by accepting them the defendant would have acquired a good title, the fact that the plaintiff was the absolute owner of only a part of them, the remainder having been furnished to him by third persons for such delivery, would neither constitute a defence or a demand for damages.'

"And in *Davis v. Harness*, 38 O.S. 397, which was a similar case, for a delivery of corn of which the plaintiff was the owner of only a part, but which he had sold with the consent of the other owners, the court say: 'A party entering into a contract in his own name may sue or be sued upon it, whether he be, in fact, agent or principal.' The same principle is also held in *Gard v. Neff*, 39 O.S. 607."

—Ed.

PLATT AND ANOTHER *v.* THE IRON EXCHANGE BANK.

SUPREME COURT OF WISCONSIN, NOVEMBER 15, 1892.

[83 *Wis.* 358.]

The complaint alleges that the plaintiffs were, at the times named, and are, co-partners, doing business under the firm name of the United States Express Company; that other persons were and are associated with them as dormant partners; that such dormant partners are very numerous and reside far apart, and that it is impracticable to bring them all before the court; that the plaintiffs sue, not only for the benefit of themselves, but for all of such dormant partners; that as such partners, the plaintiffs were, at the times named, and are engaged in the business of common carriers, as an express company, carrying property and parcels, including money, from place to place in the United States, and delivering the same to the persons to whom the same may have been consigned; that on September 20, 1889, the said plaintiffs, as such co-partners and as such common carriers, had in their possession \$41,700, having carried the same from Ashland to Hurley, and there deposited the same in the defendant bank for safe keeping; that the defendant negligently allowed said money, and all of it, to be stolen from said bank, for which amount the plaintiffs claim damages.

To this complaint the defendant demurred on the ground that there is a defect of parties plaintiff, by the nonjoinder of said dormant partners. From an order overruling said demurrer the defendant appeals.

Quarles, Spence & Quarles, for appellant.

Winkler, Flanders, Smith, Bottum & Vilas, and *W. K. Gibson*, for respondents.

CASSODAY, J.:—It sufficiently appears from the complaint that the plaintiffs, Platt and Crosby, are the ostensible partners, and that all the other partners not joined as plaintiffs are dormant partners. It is well settled at common law that a dormant partner need not be joined with his co-partners in an action to recover partnership demands.¹ Whether such action was brought in the name of the ostensible partners alone or in the name of all the partners, the same was without prejudice to any defence by way of setoff or otherwise. *Hilliker v. Loop*, 5 Vt. 116. A dormant partner is one who takes no active part in the business of the firm, and whose name does not appear in the title of the partnership, and who is unknown to those who give credit to the firm. 17 Am. & Eng. Ency. of Law, 928. The reason why such dormant partners were unnecessary parties plaintiff seems to have been that the contract or transaction was, so far as the defendant was con-

¹ *Citing*, *Bird v. Fake*, 1 Plin. 890; *Lloyd v. Archbowle*, 2 Taunt. 324; *Clark v. Miller*, 4 Wend. 628; *Shropshire v. Shepperd*, 3 Ala. 733; *Hilliker v. Loop*, 5 Vt. 116; *Wood v. O'Kelley*, 8 Cush. 406; *Waite v. Dodge*, 34 Vt. 181; *Garrett v. Muller*, 37 Tex. 589.

cerned, with such ostensible partners alone, and without reference to such dormant partners.

There is nothing in the Code to take away the force of such reasoning. On the contrary, it is expressly provided that "a trustee of an express trust . . . may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another." R. S., sec. 2607. Thus it has repeatedly been held that a consignor or shipper is, by operation of the rule, regarded as a trustee of an express trust, like a factor or other mercantile agent who contracts in his own name on behalf of his principal, and hence, though not the owner, may sue the carrier for injury to or loss of the goods shipped during their transportation.¹ In *De Wit v. Lander*, 72 Wis. 120, an ostensible partner was not joined, and hence the case is distinguishable. The same principles have been recognized, if not held, as applicable to the nonjoinder of dormant partners.² One or two cases are cited from the inferior courts of New York, which seem to justify the contention of the defendant; but we think it was not intended by the Code to work such change in the rules of pleading.

Here the money was deposited in the bank by the plaintiffs, as the only ostensible partners doing business in the firm name mentioned. As such ostensible partners they were certainly trustees and agents of such dormant partners. The defendant accepted the money from such ostensible partners, and without reference to such dormant partners. The defendant is answerable, therefore, if answerable at all, to the plaintiffs, from whom it received the money.

By the Court.—The order of the Circuit Court is affirmed.

¹ *Citing*, *Hooper v. C. & N. W. R. Co.*, 27 Wis. 91; *Waterman v. C., M. & St. P. R. Co.*, 61 Wis. 464; *Salter v. Krueger*, 65 Wis. 217.

² *Citing*, *North v. Bloss*, 30 N. Y. 374; *Howe v. Savory*, 49 Barb. 403; *Nat. Bank v. Thomas*, 47 N. Y. 19; *Leslie v. Wiley*, 47 N. Y. 648; *Marvin v. Wilber*, 52 N. Y. 272.

GARD v. NEFF.

SUPREME COURT OF OHIO, JANUARY TERM, 1884.

[39 O. S. 607.]

Error to the District Court of Clarke County.

On December 1, 1871, Eli J. Gard as principal, and Benj. M. Gard as surety, gave to Adam Neff, the guardian of Edgar J. Barr, a minor, their promissory note of the following tenor:

"\$500. One year after date, we, or either of us, promise to pay to Adam Neff, guardian of Eugene J. Barr, or order, the sum of five hundred dollars, with interest from date at the rate of 8 per cent. per annum. Value rec'd. Interest payable annually. Dec. 1st, A. D. 1871.

"E. J. GARD,

"B. M. GARD."

On May 17, 1875, Neff, being still such guardian, commenced an action in the court below upon this note, describing himself in his petition as such guardian, alleging the minority of his ward, his own guardianship, the non-payment of the note, except certain credits, and praying judgment upon it.

Upon the plaintiff's ward attaining his majority, the defendants filed, upon leave, a joint supplemental answer alleging this fact and praying that the action, for that reason, be dismissed. The plaintiff's demurrer to this pleading was sustained and the defendants excepted.¹

Kiefer & White, for plaintiff in error.

George Spence and *J. K. Mower*, for defendant in error.

OWEN, J.—Was there error in holding, by sustaining the demurrer to the supplemental answer, that the coming to his majority by the ward of Neff was no ground for dismissing the action? The propositions contended for by the plaintiff in error are, that the note in suit was a contract for the ward; that the proceeds belonged to him; that the beneficial interest was his; that Neff is named in the note and the suit because of the disability of the ward to contract or sue; that upon the ward coming to his majority, the disability and the guardianship at once determined, and with them the right of the plaintiff further to prosecute the action.

We are not called upon to consider the respective relations which the guardian and the ward sustained to this note or its proceeds, nor to consider the power of the guardian to bind his ward by the act of taking the note, or of bringing suit upon it; for if he had no such power, there clearly was no error; and if the position contended for is sound, the form of, and parties to the action were abundantly provided for by sections 25 and 27 of the Code of Civil Procedure, which provided that every action must be prosecuted in the name of the real

¹The statement of facts has been abridged.

party in interest, *except that a person with whom or in whose name a contract is made for the benefit of another . . . may bring an action without joining with him the person for whose benefit it is prosecuted.* The promise of the defendants was to pay Neff, who was named as guardian; the action was by Neff as plaintiff, although described as guardian. His right to "prosecute" the action was clear, and no error intervened in the refusal to dismiss the action or order its abatement upon the ward reaching his majority.¹

*Judgment affirmed.*²

WETMORE v. HEGEMAN.

COURT OF APPEALS OF NEW YORK, FEBRUARY 7, 1882.

[88 N. Y. 69.]

Appeal from a judgment of the General Term of the Supreme Court, affirming a judgment in favor of the plaintiff, entered upon a verdict.

The nature of the action and the material facts appear in the opinion.

Samuel Hand, for appellant.

William Allen Butler, for respondent.³

EARL, J.—The merits of the original action are not involved upon this appeal. It is not disputed that the amount reported by the referee in that action is due from the defendant to some one; but the claim made on his behalf is that it is not due to the plaintiff, and this claim will be first considered.

The original claim was for money due to the firm of Campbell & Moody, who were the original plaintiffs in the action, from Charles Kelsey, who was the original defendant. The money claimed in the action was due upon a contract between Campbell & Moody of the one part and Kelsey of the other. The action was commenced in June, 1855. Prior to that time Campbell & Moody had assigned to John S. Gilbert their claim against Kelsey under their contract with him, to secure Gilbert for a certain indebtedness which they owed him. Thereafter, and in January, 1865, Gilbert, for a good and valuable consideration, assigned all his claims against Campbell & Moody to James M. Blackwell. Afterward a receiver of the assets of the firm Campbell & Moody was appointed, and he, under authority of the Court, assigned the claim of Campbell & Moody against Kelsey, which was involved in the original action, to James M. Blackwell, and thus he, Blackwell, became vested with the entire legal title to the claim. Afterward Blackwell died, and his administratrix assigned the claim to the pres-

¹Part of the opinion, on another point, is omitted.

²Compare *Reed v. Lane* (1895), 96 Iowa 454. —Ed.

³The arguments are omitted.

ent plaintiff, Wetmore, and thus the legal title to the claim became vested in him.

It appears that Blackwell took the assignment from Gilbert and from the receiver at the instigation and request of Therasson & Bryan, a firm of lawyers; and that he took and held the claim expressly in trust for them, he having no interest therein except as such trustee. It also appeared that the assignment from Blackwell's administratrix to this plaintiff was made at the request and instigation of Therasson & Bryan, and for their benefit, and that the plaintiff took the assignment to himself and holds the claim expressly in trust for them.

The title of the plaintiff, therefore, for the purposes of this action, is just as valid and effectual for every purpose as if he held the claim absolutely in his own right. The title has been placed in him by the only persons interested therein against the defendant. Recovery by him and payment to him will be an absolute protection to the defendant, and that is all he can require. He alleges no equities, set-off, or counterclaims against Therasson & Bryan, and hence their absence as parties to the action can in no way harm or embarrass him. The plaintiff is, therefore, within the meaning of section 113 of the Code of Procedure, a trustee of an express trust, and can, therefore, maintain this action without joining with himself the persons beneficially interested in the claim.¹

It is, however, objected on the part of the defendant that as Blackwell held the claim upon an express trust for Therasson & Bryan, it did not pass to his administratrix, and hence her assignment to the plaintiff at the request and upon the procurement of Therasson & Bryan did not pass to him any title. This claim is not well founded. This trust did not devolve upon the Supreme Court upon the death of Blackwell, as claimed by the counsel for the appellant. It was a trust pertaining to personal property, and it is well settled that the legal title to the property upon the death of the trustee in such a case passes to the legal representatives of the trustees. *Bunn v. Vaughan*, 5 Abb. Pr. N. S. 269; *Emerson v. Bleakley*, id. 350; *Boone v. Citizens' Savings Bank*, 84 N. Y. 83. Under these authorities it is clear that the administratrix of Blackwell could transfer the legal title to this claim of the plaintiff, and as the transfer was made by the procurement and upon the request of the sole beneficiaries under the trust, no question whatever can be made that the plaintiff had a perfect title and has a sufficient standing to enable him to maintain this action.²

All concur.

Judgment affirmed.

¹ *Citing*, *Considerant v. Brisbane*, 22 N. Y. 389; *Allen v. Brown*, 44 id. 228; *Greene v. The Niagara Fire Ins. Co.*, 6 Hun 128; *Cummins v. Barkalow*, 1 Abb. Ct. App. Dec. 479.

² The further point was made that Therasson & Bryan, in procuring the title of this claim to be placed in the name of Blackwell, and afterward in the name of the plaintiff,

WYNNE v. HECK.

SUPREME COURT OF NORTH CAROLINA, FEBRUARY TERM, 1885.

[92 N. C. 414.]

Civil action tried on the report of a referee, and the exceptions filed thereto. The Court adopted the findings of fact and affirmed the conclusions of law of the referee, overruled the plaintiff's exceptions, and adjudged the action be dismissed. From this judgment the plaintiff appealed.

Messrs. Gray & Stamps and Armistead Jones, for plaintiff.

Messrs. Pace & Holding, for defendant.

MERRIMON, J.—The plaintiff alleged in his complaint that the defendant was indebted to him on sundry accounts in the sum of \$679.48. This, the defendant, in his answer, denied, and thus it became necessary for the plaintiff to establish his alleged debt by proper proof.

By consent of the parties, the whole matter in contention was referred, under the code of civil procedure, with instructions to the referee to report his findings of law and fact. The referee among other things, reported as follows:

"Prior to the commencement of this action, E. R. Stamps, an attorney at law, had certain claims against the plaintiff in his hands for collection, and presented the same to him for payment, who thereupon transferred to the said Stamps the account on which this action is brought, for collection, it being agreed between them at the time, that said Stamps should collect the same and apply the proceeds to the claims so held by him for collection against the said Wynne.

"The plaintiff can not maintain this action, but it should have been brought in the name of the said E. R. Stamps as trustee of an express trust."

Upon these findings the court held, and we think properly, that the plaintiff could not recover. It is obvious that the plaintiff sold and transferred his debt against the defendant to E. R. Stamps, upon the express trust that he should collect the same, and apply the money when collected to the payment of the debts he, as attorney, held

violated the section of the Revised Statutes (2 R. S. 288, § 71) which provides that "no attorney, counselor, or solicitor shall directly or indirectly buy, or be in any manner interested in buying, any bond, bill, promissory note, bill of exchange, book debt, or other thing in action with the intent and for the purpose of bringing any suit thereon." But the Court was of opinion that in the circumstances of the case there was no violation of this statute. "The facts admitted in the pleadings and proved upon the trial show clearly that this claim was not purchased for the purpose of bringing a suit thereon. Before Therasson & Bryan became interested therein a suit had been instituted upon the claim by another attorney, and that suit was pending."

—Ed.

against the plaintiff for collection. The trustee had the ownership of the debt, and he was charged by the trust to collect it, not for the plaintiff, but for certain of his creditors. The plaintiff could not of right reclaim it, nor could he sell or dispose of it to another, except subject to the trust. The debt belonged to Stamps as trustee of an express trust. The Code, sec. 177, provides that the action must be brought in the name of the party in interest, unless as otherwise provided, and section 179 provides, that the trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted, but he, in such case, must sue alone, or join the beneficiary with him. *Willey v. Gatling*, 70 N. C. 410.

The counsel for the plaintiff cited and relied upon *Abrams v. Cureton*, 74 N. C. 523. That case is not like, but very different from this. In this case, the plaintiff transferred his debt to the trustee for a valuable consideration, that is, that the trustee would collect the debt, and with the money pay certain debts owed by the plaintiff to certain persons. In that case there was no consideration. Abrams was merely an agent or attorney, who undertook to collect certain notes for the owner of them, who did not part, nor intend to part, with the ownership of them.

There is no error, and the judgment must be affirmed. •

No error.

Judgment affirmed.

FERGUSON v. McMAHON.

SUPREME COURT OF ARKANSAS, NOVEMBER TERM, 1889.

[52 Ark. 433.]

John T. McMahon brought replevin against J. T. and J. N. Ferguson, to recover four bales of cotton which he claimed as agent of Thomas E. McMahon, under a mortgage executed to the latter by Daniel Dixon, who sold the cotton to the defendants.

One of the instructions given to the jury is as follows: "If the jury believe from the evidence that one Dan Dickson raised the cotton in question, and that he had mortgaged the same to Thomas E. McMahon, to secure a debt, and that said debt has not been fully paid; that said mortgage had been filed or recorded before the purchase of the cotton in question by the defendants, and in the county where said cotton was grown, then you will find for the plaintiff, provided you find that the plaintiff was the agent of said Thomas E. McMahon."

The verdict and judgment were for the plaintiff, and the defendants appealed.

Sec. 4936 Mansf. Dig. is as follows: "An executor, administrator,

guardian, trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or the State, or any officer thereof, or any person expressly authorized by the statute to do so, may bring an action without joining with him the person for whose benefit it is prosecuted."

Atkinson, Tompkins & Greeson, for appellant.

C. C. Hamby, for appellee.¹

COCKRILL, C. J.—No reason is disclosed for allowing a recovery for the benefit of Thomas E. McMahon in the name of John McMahon. He is not a trustee for Thomas E.; the mortgage contract was not made in his name; nor is he a person with whom the contract was made and therefore entitled to sue in his own name, within the meaning of Sec. 4936 of Mansf. Dig.

It is true that the plaintiff, John McMahon, conducted the negotiations which led to the mortgage, and also directed its execution, but he is not a party to the instrument, and in all his dealings was only the agent of Thomas E. McMahon, the mortgagee. An agent who makes a contract for his principal in the principal's name, is not, in any legal sense, a person with whom the contract is made; the contract in such a case is with the principal only, and he alone is authorized to enforce it. Bliss on Code Pl., § 56. The agent in such a case has not necessarily even the implied authority to discharge the contract by receiving what is due upon it, much less the right to enforce payment by suit. *Meyer, Bannerman & Co. v. Stone*, 46 Ark. 210.

The Court erred, therefore, in instructing the jury that John McMahon could in any event recover the property in dispute upon the faith of the mortgage executed to Thomas E. McMahon.

If John McMahon was the bailee of the property, or had a special interest in it, as he testified, he could maintain an action in his own name against one who wrongfully deprived him of the possession. Bliss Code Pl., on *supra*. But the evidence was conflicting upon that phase of the case, and we can not disregard the error pointed out.

Reverse the judgment and remand the cause for a new trial in accordance with this opinion.²

¹The arguments are omitted.

²See *Swift v. Swift* (1873), 46 Cal. 267: "It is objected that the judgment is erroneous because \$2,000 of the money sued for belonged to one Ann Reed. We think the objection well taken. It is evident, from the testimony of the plaintiff, that in loaning this money he acted as the agent of Ann Reed, and loaned the money as her money. He did not pretend to be acting for himself. She was consulted, and directed as to the terms of the loan. The indebtedness arose to her then, and not to the plaintiff. The indebtedness not being to him, of course the plaintiff could not sue for it."—*Per* BELCHER, J.

And generally, as to the right of a mere agent to sue in his own name, see *Crescent Furniture Co. v. Raddatz* (1887), 28 Mo. App. 210. [Action in a justice's court "by E. G. as agent of G. R."]: "In this state civil actions must be prosecuted in the name of the real party in interest, with certain statutory exceptions. Rev. Stat., §§ 3462, 3463. These exceptions do not extend so far as to allow a person to prosecute an action in his own name as the agent of some other person. No such thing is known to our remedial system, or to any other remedial system with which we are acquainted. A trustee of an express trust

SANDERSON ET AL. v. CERRO GORDO COUNTY.

SUPREME COURT OF IOWA, MAY 15, 1890.

[80 Iowa 89.]

The plaintiffs are the trustees and the clerk of Grant township, in the defendant county, and by virtue of their offices they constitute the board of health of said township.

The petition shows that in August, 1886, certain inhabitants in Grant township were infected with smallpox to the extent that the public health of the township was in danger; that, to make suitable provision against such danger, the plaintiffs, as a board of health, appointed one J. R. Jones as a physician for the board, and directed him to take charge of the matter, and adopt such measures as he thought suitable to prevent the spread of the disease; that Jones, in the performance of this duty, rendered services of the value of \$170.50; that the plaintiffs, in their capacity as trustees and clerk of the township, levied a tax of \$300 on the taxable property of the township in September, 1886, for the use of said board of health in smallpox matters, which tax was collected by the treasurer of the county and paid over to Grant township; that on November 1, 1886, the board of health paid from the money so raised the amount due Jones; that the claim therefor was filed with the board of supervisors of the defendant county, and by it refused. The petition avers that the plaintiffs are entitled to recover the amount for the use of the board of health of said township, and asks judgment accordingly.

To this petition a demurrer was filed, and, among other grounds, it is urged that the plaintiffs are not proper parties to maintain the suit. The district court sustained the demurrer, and from a judgment for the defendant the plaintiffs appeal.

John Cliggit, for appellants.

J. J. Clark, County Attorney, for appellee.

GRANGER J.—We deem it unnecessary to refer to more than one ground of the demurrer, as it seems decisive of the case. There is no pretense, but in fact it is expressly urged, that the suit is by the plaintiffs in their official capacity, “for the use and benefit of the

may, under § 3463, sue in his own name; but then the legal title and, where possession is in controversy, the right of possession, if any, is in him, and not in the beneficiaries of the trust. . . . A person can prosecute or defend in our courts either in person or by attorney, and in justices' courts he can do it by an agent who is not an attorney. Rev. Stat., §§ 2905, 2908, 2911. But where, in justices' courts, he prosecutes by agent, the proceeding must run in the name of the principal, just as in a court of record.”—*Per THOMPSON, J.*

See also *Sandmeyer v. Dakota F. & M. Ins. Co.* (1891), 2 S. D. 346, 351. *Drafer v. Farris* (1893), 56 Mo. 417, 419. *Mitchell v. St. Mary* (1897), 148 Ind. 111.

Compare *Ludwig v. Gillespie* (1887), 105 N. Y. 653, ante p. 227; *Melcher, as Attorney and Agent, v. Kreiser* (1897), 21 Misc. 159, ante p. 228; S. C., 28 App. Div. 362, ante p. 230. —*Ed.*

township, or for the local board of health." The action is at law, and we must look to the provisions of the statute for a recognition of their right to bring the suit.

Appellants do not attempt to point out a section of the statute, or a decision, as authority for this proceeding, except the case of *Long v. Emsley*, 57 Iowa 13, wherein it was held that a township clerk could maintain a suit to recover money to which he was entitled by virtue of his office, such as road funds; but the facts in this case are widely different. We know of no law giving the plaintiffs the right to receive and hold the funds in question, conceding the liability of the county for its payment. The code, section 2543, provides, that, "every action must be prosecuted in the name of the real party in interest, except as provided in the next section." It is plain that the plaintiffs are prosecuting the suit in a representative capacity, and we inquire if they come within the exceptions of section 2544. It provides: "An executor or administrator, a guardian, a trustee of an express trust, a party with whom or in whose name a contract is made for the benefit of another, or a party expressly authorized by statute, may sue in his own name, without joining with him the party for whose benefit the suit is prosecuted." With all that appellants claim, the township or the board of health must be held as the real party in interest. Appellants say that the "local board . . . have a trust capacity" which entitles them to act. If it is true that they have as to the funds in question—which we must not be understood as holding—still it is not an express trust, but one clearly arising by implication, and the plaintiffs are not within the provision of the statute. We think it unnecessary to elaborate, and the judgment of the district court is *Affirmed*.¹

LEWIS v. WHITTEN ET AL.

SUPREME COURT OF MISSOURI, NOVEMBER 28, 1892.

[112 Mo. 318.]

The facts are given in the opinion.

Neal & Duckworth and *D. H. McIntyre* for plaintiffs in error.

John H. Lucas and *Calvird & Lewis* for defendant in error.²

BRACE, J.—This is an action brought in the Circuit Court of St. Clair county by Robert E. Lewis, plaintiff, against Stokley D. Whitten and James Elliott, defendants, to set aside a deed executed by Whitten and wife, bearing date June 14, 1881, conveying a tract of land in said county to Elliott for the expressed consideration of \$3,600, on the

¹ See the remark of DIXON, C. J., in *Robbins v. Deverill* (1865), 20 Wis. 142, 149, given in the text, *ante*. Compare *McHenry v. Painter* (1882), 58 Iowa 365, 368 —Ed.

² The arguments are omitted.

ground that this deed was made without consideration, and with the intent upon the part of Whitten to hinder, delay, and defraud his creditors, in which fraudulent intent Elliott participated.

The trial court so found, and set aside and annulled the deed; the case is brought here by the defendants on writ of error.

It appears from the evidence that, prior to the April Term, 1881, of the Circuit Court of Henry county, a son of Whitten had been arrested for grand larceny in said county, which adjoins St. Clair on the north; that Whitten had entered into a recognizance to the State of Missouri in the sum of \$1,000 for the appearance of his son at the April Term aforesaid of the Henry County Circuit Court, to answer such charge; that at the said term the son was indicted for grand larceny, but failing to appear the recognizance was forfeited; and that on June 14th following the deed in question was executed. The tract conveyed contains about 315 acres of land, worth at that time between \$4,000 and \$5,000. . . .

On January 28, 1885, an *alias* execution on the judgment in favor of the state against Whitten on the forfeited recognizance was issued to the sheriff of St. Clair county from the office of the Clerk of the Circuit Court of Henry county, and, on March 3, 1885, the land was sold by virtue of this execution by said sheriff.

At that time the plaintiff, Robert E. Lewis, was the prosecuting attorney of Henry county. At the sheriff's sale he became the purchaser thereof, being the highest bidder at the price of \$434; and on the same day the said Sheriff duly executed and acknowledged his deed conveying said land to the plaintiff, in consideration of said purchase price, the receipt of which he therein acknowledged; and on March 14, 1885, this suit was commenced. . . .

The defendant Whitten in his answer alleged that the plaintiff was the attorney for the state of Missouri, paid nothing for his purchase, and is holding the same as trustee for the state. And on the trial Whitten offered to prove that the "plaintiff was the prosecuting attorney of Henry county, Missouri, from the first of January, 1883, to the first of January, 1887; that while acting as such prosecuting attorney he came to the city of Osceola, attended the sale of the land in controversy under forfeiture of the bond, and bid in the land; that the plaintiff did not pay and never has paid the amount of his bid into the school fund of Henry county; that plaintiff did not execute and never has executed to Henry county any bond or agreement to the school fund of said county, making good his bid; that the plaintiff was not a purchaser of the land in controversy for a good and valuable consideration; that he never paid anything on said bid, nor secured the same by bond or otherwise; that he was not the authorized agent of Henry county for the purpose of bidding said land in; that he had no appointment or authority in writing; that the plaintiff bid said land off and took the deed in his own name."

So far as this evidence tended to contradict the sheriff's return, it was inadmissible. The object of the offer, however, seems to have been to show (and it is so argued here) that the plaintiff is not the real party in interest, and, therefore, can not maintain this action.

This point is not well taken. The whole object of this suit is to set aside an alleged fraudulent deed to land, the legal title of which is vested in the plaintiff, if the allegation of fraud is shown to be true. It does not follow because the plaintiff, owing to the official relation he sustained to the state, to the county of Henry, and its school fund, at the time of the purchase, after being reimbursed for the amount he expended in securing the title and compensation for his services as such official, will hold the title to the land in trust for the benefit of the school fund of Henry County, that he is not the proper party to sue. The purchase was made for his own benefit to the extent of such reimbursement and compensation, and for the benefit of the school fund to the extent of the remainder. This purchase was a contract made by the plaintiff, in his own name for the benefit of himself and the school fund, and he is the proper party to sue in this action, not only for the protection of his own individual interest, but also that, as trustee of an express trust within the definition of the statute, in a contract made in his own name for the benefit of another, he may be enabled to discharge his obligation to the *cestui que trust* for whose benefit the purchase was also made.

The judgment is affirmed.

All concur.¹

HANLON v. THE METROPOLITAN LIFE INSURANCE COMPANY.

NEW YORK COMMON PLEAS, GENERAL TERM, JUNE, 1894.

[9 Misc. 70.]

Appeal from a judgment of the District Court in the City of New York, rendered, without a jury, in favor of the plaintiff.

Thomas Gilleran, for respondent.

C. N. Bovee, Jr., and *J. McG. Goodale*, for appellant.

BISCHOFF, J.—The plaintiff sued upon a policy of insurance upon the life of her brother, and in which she was designated as the beneficiary. As a counterclaim defendant interposed a judgment obtained against the plaintiff and assigned to the former.

By stipulation of the parties, made upon the trial and appearing in the return, it was admitted that the plaintiff was entitled to recover the amount of the policy in suit, there being no defences thereto;

¹ Part of the opinion, on other points, is omitted.

and, upon the other hand, the plaintiff conceded that the judgment upon which claim was made by the defendant had been duly assigned for sufficient consideration, and that the plaintiff was the person against whom such judgment had been obtained. Upon the trial it was conceded furthermore, on the part of the plaintiff, that, were she suing for her individual benefit, the amount of the counterclaim, in excess of the sum due upon the policy, should properly be allowed in judgment for the defendant.¹

Such being the attitude of the parties, evidence was given on behalf of the plaintiff, under objection, showing an oral agreement between the plaintiff and the insured which was to the effect that, in consideration of the policy and the payment of the premiums as they accrued from time to time, and the receipt of the proceeds of the policy upon the death of the insured, the plaintiff would defray the funeral expenses of the insured. It was also a part of such oral agreement that one Finan, an undertaker, should be employed on the occasion of the insured's burial. The justice below rendered judgment in favor of the plaintiff for the amount claimed, disregarding the counterclaim interposed by the defendant, the judgment resting apparently upon the provisions of section 502, subdivision 3, of the Code of Civil Procedure, which are as follows: "If the plaintiff is a trustee for another, or if the action is in the name of a plaintiff who has no actual interest in the contract upon which it is founded, a demand against the plaintiff shall not be allowed as a counterclaim, but so much of a demand existing against the person whom he represents, or for whose benefit the action is brought, as will satisfy the plaintiff's demand, must be allowed as a counterclaim, if it might have been so allowed in an action brought by the person beneficially interested." . . .²

That, in consideration of the policy and the payment of the premiums by the insured, the plaintiff may have rendered herself liable to the personal representatives of the insured, or to the undertaker, upon her promise to pay the funeral expenses of the insured, does not render either the representatives or the undertaker beneficially interested in the policy issued by the defendant. If that were otherwise, this action would not be maintainable, since, by express provision of law (Code Civ. Proc., § 449), the action must be brought in the name of the real party in interest. The institution and prosecution of the action by the plaintiff as the beneficiary named in the policy is, therefore, in and of itself a refutation that another is the real party in interest. To hold that the counterclaim is not available to the defendant because another than the plaintiff is the

¹ *Citing, Wells v. Henshaw*, 3 Bosw. 625; *Clark v. Story*, 29 Barb. 295; Code Civ. Proc., § 1909.

² Part of the opinion, touching on the application of this section to an action brought in the District Court, is omitted.

real party in interest respecting the demand sought to be enforced, is to say that the plaintiff is not entitled to a recovery. The plaintiff's contentions respecting her claim and the defendant's counterclaim are, therefore, plainly inconsistent. She is either the party in interest, and then the counterclaim is available, or she is not the party in interest, and then she can not maintain the action. By bringing and prosecuting the action, and asserting her right to recover, she insists that she is the party in interest respecting the demand in suit, and so, by her own admission, the defendant's counterclaim is available against her. A judgment in her favor determines that it was.

It is apparent that subdivision 3 of section 502 of the Code of Civil Procedure must be read with the provision of section 449, and that the persons against whom a personal indebtedness shall not be available to the defendant as a counterclaim are such as may be properly classed as "trustees of express trusts."¹ No express trust in favor of the legal representatives of the insured, or the undertaker, was created by the plaintiff's oral agreement to pay the funeral expenses.²

As between the parties to the insurance contract, the promise of the defendant to pay the amount named in the policy does not appear to have been made for the benefit of any person other than the plaintiff, the beneficiary designated in the policy. Defendant was no party to plaintiff's alleged oral agreement. Hence it can not be successfully urged that the contract which the plaintiff sought to enforce with this action was made with her, or in her name, or with the insured, or in the name of the insured, for the benefit of either the personal representatives of the insured or the undertaker. Plainly, then, the case is not one within the operation of the provision of section 449 of the Code of Civil Procedure, that "a person with whom or in whose name a contract is made for the benefit of another," shall be deemed to be the trustee of an express trust.

The foregoing considerations lead to the conclusion that the justice erred in disallowing defendant's counterclaim, and that the judgment should be reversed.

Judgment reversed and new trial granted, with costs to the appellant to abide the event.

BOOKSTAVEN, J., concurs.

¹ Citing, *Hood v. Hayward*, 124 N. Y. 1, 24; *Sperb v. McGoun*, 110 id. 605, 610; *Wetmore v. Porter*, 92 id. 76, 83; *United States Trust Co. v. Stanton*, 139 id. 531, 534; *Duncan v. China Mut. Ins. Co.*, 129 id. 237, 246.

² Citing, *Pomeroy, Rem. & Rem. Rights*, §§ 171-182; *Considerant v. Brisbane*, 22 N. Y. 339.

HENNING v. RAYMOND.

SUPREME COURT OF MINNESOTA, JUNE 25, 1886.

[35 Minn. 303.]

The plaintiff, as receiver of the assets of a partnership, brought this action in the district court for Winona county, to recover for goods sold and delivered by the partnership. The action was tried without a jury, before Start, J., who ordered judgment for the plaintiff, from which the defendant appeals.

Lloyd Barber, for appellant.

Berry & Morey, for respondent.

MITCHELL, J.—In an action pending in the circuit court of Cook county, Illinois, to dissolve the partnership between the parties to that suit, plaintiff was, by order of the court, appointed receiver of all and singular the business and property of the partnership, with power and authority "to take possession of all the accounts, stock in trade, money, effects, and property, of every kind and nature, wherever situated, and to collect all outstanding debts due to said partnership." Plaintiff brings this action to collect a debt due the copartnership. It does not appear what powers or rights over the property are given to such receivers by the statute of Illinois. There is no statute in this state expressly giving a receiver authority to maintain such an action. We must assume that the plaintiff is what is called a "common-law receiver," with just such powers as are given him by the order of the court.

No question is made as to the power of the court to authorize this receiver to bring action to collect debts due the copartnership. Neither is it claimed, as we understand appellant, that the authority here given to collect does not include authority to bring suit when necessary. The only point raised is that plaintiff can not maintain such an action in his own name, but should have brought it in the name of the partnership to whom the debt was due.

The rule generally laid down in the books is that, where a receiver is appointed under the equity powers of the court, he can not sue in his own name, but the action must be brought in the name of the legal owner of the property, who will be compelled to allow the use of his name for that purpose. This rule seems to be predicated upon the idea that a common-law receiver is the mere custodian of the property, and can not be considered as an assignee of it, and does not become the owner. Such, at least, seems to have been the doctrine of the common-law courts; and courts of chancery, when called upon to authorize their receivers to proceed in an action at law, were necessarily compelled to conform to the rules of the common-law courts.

It is true that a common-law receiver, such as the plaintiff, is not the assignee or owner, beneficially at least, of the property intrusted to him; but it is an incomplete and inaccurate statement of his relations to the property to say that he is merely its custodian. When a court has taken property into its own charge and custody for the purpose of administration and disposition, in accordance with the rights of the parties to the litigation, it is *in custodia legis*. The title of the property for the time being, and for the purposes of such administration, may, in a sense, be said to be in the court. The proceeding by receivership is *quasi in rem*, so far as it involves a sequestration of assets.

The receiver is appointed for the benefit of all concerned. He is the representative of the court, and of all parties interested in the litigation wherein he is appointed. He is the right arm of the court in exercising the jurisdiction invoked in such cases of administering the property. The court can only administer and dispose of it through a receiver. For this reason, all suits to collect or obtain possession of the property must be prosecuted by the receiver, and the proceeds received and controlled by him alone. If the suit be nominally prosecuted in the name of the original owners of the property, it is an inconvenient, as well as useless, form; they have no discretion as to instituting the suit, and no control over its management, and no right to the possession of the proceeds. The receiver, as an officer of the court which has taken control of the property, is, for the time being, and for the purpose of the administration of the assets, the real party in interest in the litigation. There is no reason, therefore, why the suit should not be instituted in his own name. Hence, in many states, it is so provided by statute. But in many jurisdictions, in the absence of any such statute, it has been held that the courts may, by virtue of their inherent equity powers, authorize their receivers to institute suits in their own names.¹

Whatever technical reasons may have existed for refusing to permit common-law receivers to sue in their own names, they exist no longer, under our Code. As an officer of the Court, intrusted with the administration of the partnership assets, we do not see why plaintiff has not such a special property in them as to constitute him "the real party in interest," within the meaning of the statute. But inasmuch as, in his official capacity, he acts as "the trustee of an express trust," he has, in any event, a right to maintain this action on that ground. See *Person v. Warren*, 14 Barb. 488; *Thomas v. Bennett*, 56 Barb. 197.²

Judgment affirmed.

¹ *Citing*, *Davis v. Gray*, 16 Wall. 203; *Hardwick v. Hook*, 8 Ga. 354; *Leonard v. Storrs*, 31 Ala. 488; *Wray v. Jamison*, 10 Humph. 185; *Tillinghast v. Chaplin*, 4 R. I. 173 (67 Am. Dec. 510.)

² And see *Weland v. Haugan* (1897), 70 Minn. 349, 355: "A receiver or assignee for the benefit of creditors is a trustee of an express trust, and as such is empowered to bring actions in his own name, under G. S. 1894, §515S."—*Per* COLLINS, J. See also *Evans v.*

STARKER & REMEY, TRUSTEES, *v.* THE MCCOSH IRON &
STEEL CO. ET AL.

SUPREME COURT OF IOWA, APRIL 6, 1895.

[94 Iowa 330.]

The defendants, other than the McCosh Iron & Steel Company, are the Burlington, Cedar Rapids & Northern Railroad Company, Adam Moehn, and C. W. Rand, Receiver. The plaintiff trustees are the holders of certain bonds issued by the McCosh Iron & Steel Company for \$225,000, which bonds the Company had secured by a mortgage on its plant, including certain personal property. . . .

Because of a failure to pay the interest on the bonds as it became due, under a provision of the mortgage, the entire mortgage debt became due, and this action is to foreclose the mortgage therefor. On the day of the filing of the original petition, was also filed an application for the appointment of a receiver, pending which application a supplemental petition was filed, making Adam Moehn and the defendant railroad company parties defendant. As to the railroad company, it is alleged that it has removed, or is about to remove, from the plant a large quantity of iron rods which are included in the plaintiff's mortgage, and an injunction was asked and obtained to prevent such removal. . . .

The prayer of the petition is that all the property be preserved to the plaintiffs, and applied to the discharge of their claim under the mortgage. The defendants Moehn and the railroad company each answered. The McCosh Iron & Steel Company made no defence, and, as to it, the district court gave judgment for plaintiff, and for defendants Moehn and the railroad company; as to them, the plaintiff appeals. . . .

P. Henry Smith and Powers & Huston, for appellants.

S. K. Tracy, Kelly & Cooper, J. T. Illick, and C. L. Poor, for appellees.

GRANGER, J.—I. The facts as to the defendant railroad company are, in substance, that it received several carloads of iron rods consigned by Naylor & Co. to itself at Burlington, Iowa, where was located the plant of the McCosh Iron & Steel Company, to be delivered to such company on payment of drafts therefor drawn by Naylor & Co. to its own order, which drafts were attached to the bills of lading,

Pease (1899), . . . R. L. . . . , 42 Atl. 506: "The theory that the receiver does not become invested with the legal title to choses in action is losing ground, as being unsatisfactory and unnecessarily technical."—*PER STINESS, J.*, referring to *Beach on Receivers* (Ald. ed.), §§ 692, 693. Compare *Hugh on Receivers*, §§ 209 *et seq.*; *Runk v. St. John* (1899), 29 Barb. 585; *Home Mutual Life Ins. Co. v. Taylor* (1864), 2 Robt. 273; *Lathrop v. Knapp* (1895), 37 Wis. 307; *Garver v. Kent* (1880), 70 Ind. 428. —Ed.

and sent to the National State Bank at Burlington, of which bank the plaintiff Remy is the president. One Kendall is the general agent for the railway company, and upon the representation of McCosh, who was an agent of the iron and steel company, that the company was in need of the iron, and that he would furnish the necessary papers, he (Kendall) delivered the rods to the company. The rods had not been paid for, and the delivery was without authority. It was after this delivery that the railway company attempted to take possession of the rods, and were stopped by the injunction. The rods were then sold, with other iron, by the trustees, and the amount realized was \$1,986.93, of which amount \$1,893.93 was for the rods in question; and the district court, finding the issues with the railroad company, entered judgment for it for that amount, and ordered the receiver to pay it.

It is said by appellants that the railroad company can not recover because not the real party in interest. The answer recited the facts, and an amendment to it presents a prayer for "judgment for the return of the property, or that it have judgment for its value," etc. That the answer sought such relief as was granted is clearly manifest on the face of it. The parties proceeded to a trial of the issues, and testimony was elicited with a view to such a judgment, if the facts were established. The plaintiffs had, after the issuance of the injunction, sold the goods, and only the money was in their hands as the subject of contention. As between the railroad company and the consignor, the company had wrongfully disposed of property intrusted to it for specified purposes; that is, for transportation and delivery under specified conditions. The property, persons, and purposes of the trust were expressly pointed out and understood. Such conditions make an express trust. Perry, *Trusts*, section 24. The railroad company, as a trustee of an express trust, could bring the action in its own name. Code, section 2544. As such a trustee, it had the right to protect itself and the rights of the company for whom the trust was exercised.¹ . . .

It seems to us that the judgment of the District Court is legal and equitable, and it is

Affirmed.

¹ Part of statement of facts and of the opinion, relating to other questions, is omitted.

KINGSLAND & DOUGLAS MANUFACTURING COMPANY
v. BOARD BROTHERS.

KANSAS CITY COURT OF APPEALS, JANUARY 28, 1895.

[60 Mo. App. 662.]

The facts appear in the opinion of the Court.

Thos. J. Smith, for plaintiff in error.

Graves & Clark, for defendant in error.¹

GILL, J.—This is an action in replevin brought to recover the possession of a steam thresher, separator, etc., which plaintiff had sold to the defendants, and on which defendants had executed a chattel mortgage, or deed of trust, to secure certain notes given for the purchase price.

Before this suit was commenced, plaintiff had sold and assigned one of the notes to the Watertown Steam Engine Company, but still held the other, and both said notes were then past due. The petition was in the usual form, and the answer a general denial. At the close of the evidence the court peremptorily instructed the jury to find for the plaintiff, and, from a verdict and judgment accordingly, the defendants have brought the case here by writ of error.

1. The first contention is that plaintiff can not maintain this action for the possession of the mortgaged property, because one of the notes secured had been transferred to the Watertown Company; that such partial assignment of the debt had the effect to transfer an interest, *pro tanto*, in the mortgage, and that the plaintiff was not, therefore, entitled to the exclusive possession of the property sued for.

We do not think this objection well taken. It, of course, must be conceded that an assignment of the debt carries the mortgage security along with it; and that a sale and transfer of a portion of such debt (as, for example, the sale and assignment of one of a number of notes secured) will take along with it a *pro tanto* interest in the mortgage security. But, strictly speaking, this interest in the mortgage so taken by the assignee of the entire debt, or portion thereof, is merely equitable in its nature—the legal title remains in the mortgagee. Jones on Chattel Mortgages (2 Ed.), secs. 503, 504.

The instrument we have here is not in the usual form of a chattel mortgage. And it can hardly be denominated a *deed of trust*, though it purports to convey the property to the Kingsland & Douglas Manufacturing Company "*in trust* to secure to said Kingsland & Douglas Manufacturing Company, or the holders thereof, the payment of the following promissory notes," etc., and authorizes said trustee (the Kingsland & Douglas Manufacturing Company), in case of a default

¹ The arguments are omitted.

in payment of the notes, to take possession of the property, sell the same, and pay the debt.

But, whether we call it a chattel mortgage with power of sale, or a deed of trust, the legal effect is the same. *Bartlett v. Teak*, 1 Fed. Rep. 770. By the instrument the plaintiff here was invested with the legal title of the property, to be held and used for the security of the notes, whether owned by the said mortgagee or trustee, or other persons. When the Kingsland Company transferred one of the notes to the Watertown Steam Engine Company, a beneficial or equitable interest to that extent was thereby assigned to said Engine Company, but yet the legal title to the whole and the beneficial interest to the extent of the note retained, remained with the plaintiff. It was all the time the trustee of an express trust.

It was formerly the rule that the assignee of the mortgage debt could not maintain replevin for the mortgaged property—that such action could only be maintained by the mortgagee, or by the assignee in the name of the mortgagee. Jones on Chattel Mortgages, sec. 503. Under our practice act, however, this rule has been broadened. It is first provided that every action shall be prosecuted in the name of the real party in interest (Revised Statutes, 1889, section 1990), except, however, the trustee of an express trust “may sue in his own name, without joining with him the person for whose benefit the suit is prosecuted. A trustee of an express trust within the meaning of this section shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.” R. S., sec. 1991.

Applying this statute to the case in hand, the holder of the notes secured by the mortgage might sue, as being the *real party in interest* (*Kingsland v. Chrisman*, 28 Mo. App. 308) or the plaintiff, as mortgagee, or trustee of an express trust, might maintain the action. And, in such case, a judgment in either case would bar the other. See *Barton v. Martin*, and authorities cited *ante*.¹

We have no concern here as to the relative rights between the Kingsland and Watertown Companies in the mortgaged property. If they fail to agree as to the proper disposition of the funds that may arise from a sale of the property, that contest must be settled in an action wherein the Watertown Company may be a party. This is a matter that does not concern these defendants. The point now decided is, that the plaintiff, as trustee of an express trust, is authorized, under the terms of the mortgage, or deed of trust, to sue for and recover possession of the mortgaged property.²

We discover no error in the action of the circuit court, and its judgment will be affirmed.

All concur.

¹ 60 Mo. App. 351, 357, where the following authorities are cited: *Anthony v. German American Ins. Co.*, 48 Mo. App. 65; *Rogers v. Gosnell*, 51 Mo. 466; *McComas v. Ins. Co.*, 56 Mo. 573-575; *Chouteau v. Boughton*, 100 Mo. 406.

² Part of the opinion, on other points, is omitted.

ETTLINGER, RESPONDENT, *v.* THE PERSIAN RUG & CARPET COMPANY ET AL., RESPONDENTS; SCHUMACHER, APPELLANT.

COURT OF APPEALS OF NEW YORK, APRIL 10, 1894.

[142 N. Y. 189.]

Appeal from order of the General Term of the Supreme Court which reversed a judgment in favor of the defendant Schumacher, entered upon an order dismissing the complaint on trial at Special Term and ordered a new trial.

This action was brought by the plaintiff as holder of a bond of the defendant the Persian Rug and Carpet Company, secured by a mortgage executed by the company to the defendant Krause, as trustee, to foreclose said mortgage.

The facts, so far as material, are stated in the opinion.

Francis B. Chedsey, for appellant.

Thomas P. Wicks, for respondent.

FINCH, J.—The determination of a single question, discussed on the argument, will dispose of this appeal.

The plaintiff was one of two bondholders protected by a trust mortgage. His complaint showed all the facts necessary to a judgment of foreclosure if the action had been brought by the trustee, and sought to justify his intervention as bondholder and plaintiff in the action upon the ground that the trustee had left this country, and was somewhere in foreign parts, and had become insane. On the trial, the fact of such absence was shown; that the family of the trustee had also departed to join him abroad; and that inquiries made in natural and reasonable directions were answered by the statement that the trustee had become insane.

The Special Term dismissed the complaint upon the ground that the bondholder could not sue where there was a competent trustee unless the latter refused to act; and where the trustee had become incompetent, it was necessary first to procure the appointment of a new trustee. The dismissal of the complaint did not go upon any failure of proof, but assuming the allegations of the complaint to have been established, the court still held that the plaintiff could not sue for a foreclosure. An appeal was taken to the General Term, which reversed the judgment and ordered a new trial.¹

¹ At this point the court remarked: "Instead of going back and presenting his defence so far as he had one, the defendant, who was the remaining bondholder, and for whose interest a foreclosure was as much of a necessity as for that of the plaintiff, adopted the perilous experiment of an appeal to this court, with the required stipulation for judgment absolute. It appeared on the argument that the defendant was injured only at a slight point: not by the foreclosure; not by its natural and proper result; not even by the appointment of a temporary receiver; but by a sale of the property claimed to have been collusive, and which vested title in the plaintiff for less than the real value. All that could have been

We are satisfied that the plaintiff had the right to maintain the action, and that fact alone justified the reversal of the judgment by the General Term. It is conceded that the beneficiary may sue where the trustee refuses, but that is because there is no other remedy, and the right of the bondholder, otherwise, will go unredressed. The doctrine does not rest rigidly upon a technical ground, but upon a substantial necessity. In the case of a corporation a stockholder may sue, not only because it refuses, but because those who represent it are the very parties who have committed the wrong. *Brinckerhoff v. Bostwick*, 88 N. Y. 52. In that case we said that a demand upon the corporation to sue would be "futile" and so was "unnecessary," and since the action could not be "effectually prosecuted in that form" the shareholders might sue. What occurred in the present case was tantamount to and equivalent of a refusal by the trustee. He had gone beyond the jurisdiction; the whole apprehended mischief would be consummated before he could be reached; and if reached there was sufficient reason to believe that he was incompetent.

But the Special Term say that in such event a new trustee should have been appointed. That simply reproduces the same difficulty in another form, for a court would hardly remove a trustee without notice to him and giving him an opportunity to be heard. And why should a new appointment be made when any one of the bondholders can equally do the duty of pursuing the foreclosure? The court, in such an action, takes hold of the trust, dictates and controls its performance, distributes the assets as it deems just, and it is not vitally important which of the two possible plaintiffs sets the court in motion. The bondholders are the real parties in interest; it is their right which is to be redressed, and their loss which is to be prevented; and any emergency which makes a demand upon the trustee futile or impossible, and leaves the right of the bondholder without other reasonable means of redress, should justify his appearance as plaintiff in a court of equity, for the purpose of a foreclosure.

It is unnecessary to consider or discuss other questions, which were numerous. What we have said requires us to affirm the order of the General Term, and award judgment absolute, against the defendant upon his stipulation, with costs.

All concur.

Ordered accordingly.

remedied in a new trial. A re-sale could have been ordered, or the plaintiff compelled to account for the property at its just and fair value, which would have given to the defendant everything to which he was entitled. Seeing the situation and observing the defendant's danger, we suggested to his counsel on the argument the prudence of escaping it by a withdrawal of his appeal. He declined the suggestion, and if any hardship results it will not be the fault of the court."

NOTE.—RIGHT OF THE BENEFICIARY TO SUE INSTEAD OF THE TRUSTEE.

See *Shelby County v. Simmonds* (1871), 33 Iowa 345, 347: "The bond in this case was executed to the State, but the money forfeited thereon is to be paid into the county treasury, as a trust fund, for the benefit of the schools of the State. It clearly appears, from the foregoing considerations, that the County is the only party entitled to receive the money. There exists no party, for whose benefit the money is held by the County, that may prosecute an action. Neither the people nor the different school organizations can prosecute the suit in their names. The County, therefore, is a proper party in whose name the action may be prosecuted. Rev. §§ 2757, 2758. We do not determine that the action could not be properly brought in the name of the State."—*PER BUCK, C. J.*

Cridler v. Curry (1873), 66 Barb. 336. [Action upon an administrator's bond, assigned by the Surrogate to be prosecuted under the act of 1837]: "Section 113 of the [New York] Code, authorizing the trustee of an express trust to sue, is merely permissive, and does not prevent the real party in interest from suing under § 111. The case of *The People v. Norton*, 9 N. Y. 176, and the other cases referred to by the plaintiff, where actions of this kind have been brought in the name of the people, only hold that the action may be maintained in that form under § 113."—*PER TALCOTT, J.*

Viadero v. Morton (1884), 6 N. Y. Civ. Pro. Rep. 238. [Action against the sureties on a bond given by an auctioneer to the mayor, alderman, and commonalty of the City of New York; the action was brought in the name of one who had lost property by the dishonest acts of the auctioneer]: "While the bond was taken by the mayor, etc., as obligees, and nominally as beneficiaries, it was only as trustees of an express trust for the benefit of any person injured by the breach of its condition. The plaintiff in his complaint charges that the auctioneer converted certain property, etc.; appropriated the proceeds of certain other property sold by him which belonged to the plaintiff and was given to the auctioneer for sale. It is charged that such acts on the part of the auctioneer were 'fraudulent and dishonest practices,' and within the provisions of the bond. In this conclusion I concur. The demurrer admits the facts. The complaint shows that the plaintiff was injured by the acts of the auctioneer, secured against by the bond, and that he is entitled to the proceeds of the recovery herein. No interest in the result, because of the special breach charged, is to be in the mayor, etc. The plaintiff is the real and only party in interest, and the action is properly brought in his name. (Code Civil Pro. § 449.) The section referred to permits an action to be brought by the trustee of an express trust for the benefit of his *cestui que trust*, but it does not preclude the real party in interest from suing to enforce the liability incurred by the obligors."—*PER BROWNE, J.*, delivering opinion of City Court of New York, Special Term.

First Baptist Church v. Brankham (1891), 90 Cal. 22. [A corporation sued in its corporate name to restrain the defendant from interfering with certain real and personal property of which the corporation claimed to be the owner, and to quiet its title thereto. Defendant denied that the plaintiff was seized and possessed of the property; it appeared that the real property had been formally conveyed to certain individuals, named in the deed, trustees of the corporation]: "While the dry, naked, legal title to the property," said the Court, "may not be in the plaintiff, yet its trustees hold it in trust for the uses of plaintiff, and their ownership and possession is the ownership and possession of the plaintiff. We can not understand how it is material to the interests of defendants in the action whether the plaintiff or its trustees is technically seized of the legal title to this realty; the plaintiff certainly has sufficient interest to bring this action."—*PER GAROUTTE, J.*

Hutchison v. Myers (1893), 54 Kan. 200. [One Myers, the beneficiary in a mortgage trust deed securing a note, sued on the note and to foreclose in his own name, making the trustee a party defendant. On demurrer it was contended that Myers could not maintain the action]: Said the Court: "It is conceded that he might prosecute an action in his own name to recover a personal judgment for the amount of the debt secured, but as the property was conveyed to Holmes for the benefit of Myers, it is claimed that Holmes alone could maintain the action for foreclosure. This claim is based on § 28 of the Civil Code, which, among other things, provides that the trustee of an express trust may bring an action without joining with him the person for whose benefit it is prosecuted. Although the trust deed purports to convey to the trustee, it is made for the mere purpose of securing a debt, and is no more than a mortgage, and can only be enforced as such. *McDonald v. Kellogg*, 30 Kan. 170. But granting that Holmes, who is named as trustee in the instrument, is the trustee of an express trust, we see no reason why the beneficiary may not properly bring the action. In this case the trustee was made a defendant, and was thereby

enabled to secure any right or protect any interest that he might have in the transaction. The general rule in that state is, that the party beneficially interested shall bring the action; but, for convenience and necessity, provision is made for the prosecution of actions by representative parties. . . . As will be observed, the provision authorizing the trustee to bring an action is permissive rather than mandatory in its terms, and hence will not preclude the maintenance of an action in the name of the real party in interest."—*Per* JOHNSTON, J., citing *Price v. Insurance Co.*, 17 Minn. 497.

See also *Rice v. Savery* (1867), 22 Iowa, 470, 478; *ante* p. 243, 247. *Strohn v. Hartford Fire Ins. Co.* (1873), 33 Wis. 648, 657. *Dayton v. Johnson* (1877), 69 N. Y. 419, 428. *Williams v. Kiernan* (1881), 25 Hun 355, 356. *Potter v. Potter* (1885), 8 N. Y. Civ. Pro. Rep. 150, 153. Compare *Hartford Co. v. Monroe Miller* (1874), 41 Conn. 112. —Ed.

II. OTHER INSTANCES OF ACTIONS IN THE NAMES OF REPRESENTATIVES.

I. *Executors and Administrators.*

NOTE.—While the Codes class executors and administrators with trustees of express trusts as representatives who may sue without joining their beneficiaries, it will be observed that the status of an executor or administrator is close akin to that of the real party in interest, so far as respects the maintenance of the action. The point has already been noticed (*ante* pp. 520-535). One other question, however, remains. Granted that the action must be by the executor or administrator, when must it be by him as executor or administrator, and when by him individually?

SHELDON v. HOY.

SUPREME COURT OF NEW YORK, GENERAL TERM, MARCH, 1855.

[11 *How. Pr.* 11.]

Appeal from an order at special term overruling a demurrer to an amended complaint, which was as follows:

"Monroe County, ss.—Stephen S. Sheldon, administrator of the goods, chattels, and credits of Job Phelps, late of Clarkson, deceased, plaintiff in this action, complains of James Hoy, defendant in this action, for this, to wit:

"That on the first day of September, 1851, at the town of Clarkson, in the County of Monroe, Job Phelps, deceased, was possessed, as of his own property, of one bay horse-colt, of the age of four or five years then past, one buggy wagon, one double harness, and one promissory note of the amount of \$80, dated about two years past, made by the said defendant, and one promissory note of the amount of \$50, dated about one year then past, made by the said defendant;—of the value of \$300; and being so possessed thereof, the said goods, chattels, and credits on the day and year first aforesaid, at the place aforesaid, came into possession of the said defendant, who, though often requested so to do, has not delivered the said goods, chattels, and credits aforesaid to the said plaintiff as administrator aforesaid; and the said defendant wrongfully detains from the plaintiff, as administrator aforesaid, the said goods, chattels, and credits aforesaid.

"And afterwards, to wit: on the 10th day of November, 1851, at the town of Clarkson, and in the county of Monroe, the said plaintiff, as administrator of the goods, chattels, and credits of Job Phelps, deceased, was possessed of one other bay horse-colt, one buggy wagon, one double harness, one promissory note of \$80, dated about two years then past, made by the said defendant, and one promissory note of \$50, dated about one year then past, made by the said defendant;—of the value of \$300; and being so possessed thereof, the said goods, chattels, and credits aforesaid, on the day and year aforesaid, and the place aforesaid, came into the possession of the defendant, who, although often requested so to do, has not as yet delivered the said goods, chattels, and credits aforesaid to the said plaintiff, as administrator as aforesaid; but wrongfully detains the said goods,

chattels, and credits aforesaid from the said plaintiff, as administrator as aforesaid;

"Wherefore the said plaintiff, as administrator as aforesaid, demands that the defendant may be adjudged to pay the said plaintiff, as administrator aforesaid, the sum of \$300, with interest from the first day of November, 1851, besides costs.

"January 19, 1852."

To this complaint the defendant demurred:

1. It is not averred, and does not appear on the first count or pretended cause of action in the said complaint, that the plaintiff is the administrator of the goods, chattels, and credits of Job Phelps, deceased;

2. It does not appear that the defendant has converted to his use the goods, chattels, and credits, or any or either of them, in the said count or pretended cause of action mentioned;

5. It does not appear in the second count, or pretended cause of action in the said complaint, that the plaintiff ever had any property in, or right of possession of, the goods, chattels, and credits, or any or either of them, in the said second count or pretended cause of action mentioned;

6. The said complaint does not state facts sufficient to constitute a cause of action.

Simeon B. Jewett, for plaintiff.

Munger & Pomeroy, for defendant.

By the Court—JOHNSON, J.—The objections relied upon by the defendant's counsel are those stated in the first, second, and fifth grounds of demurrer.

The first count is for a conversion of the property during the lifetime of the intestate, and the plaintiff can maintain the action for that cause in a representative capacity only. It is conclusively settled by authority, that a complaint commencing like the present, and containing no other allegations or statement of fact of the plaintiff's appointment, does not allege that he is an administrator, or show that he prosecutes in that capacity. The introductory statement is a *descriptio personæ* merely.¹

This being, by the rules of the pleading, a count in favor of the plaintiff in his individual right, it does not contain a statement of facts constituting a cause of action. The fact that the plaintiff is administrator, and has been regularly appointed by the surrogate of some county in this state, is a material and traversable fact, and must be stated in such form as to tender an issue to the other party. It will scarcely be pretended that matter which is merely descriptive of

¹*Citing*, Merritt agt. Seaman, 2 Selden, 168; Gillett agt. Fairchild, 4 Denio, 80, 83; Beach agt. King, 17 Wend. 197; Stanley agt. Chappell, 8 Cow. 235; People agt. Mayor's Court, 9 Wend. 490; White agt. Law, 7 Barb. 204. "Many other cases might be cited, but it is unnecessary."

"In *Merritt agt. Seaman* the Court of appeals reversed the judgment, on the ground that the defendant had recovered a set-off against the plaintiff in his representative capacity. The declaration was in form, except that the action was different, like the complaint here; and it was held to be an action by the plaintiff in his individual and not in his representative capacity, in which no set-off against the estate could be allowed."

the person of the plaintiff is issuable matter, or that it constitutes any part of the cause of action.

The learned judge, at the special term, is mistaken in supposing that the complaint in this case conforms to the former precedents. It will be seen, on examination, that in all the forms of declarations in *trover* by an administrator, there is contained, in addition to the general profert, in the body of each count, a particular averment of the granting of administration; and the first count was always to contain a particular statement of the time and place of granting, and the functionary by whom administration was granted to the plaintiff. 2 Chit. Pl. 840, 841, 6th Am. from 5th London ed. See also Till. Form 438, 439.

This must always have been necessary, as without such an averment the declarations would show no right in the plaintiff. The profert itself, I apprehend, was never traversable, although the excuse for omitting it was. 1 Chit. 398. No action can, therefore, be maintained on the first count. It shows no title in the plaintiff, and no conversion by the defendant of the plaintiff's property, in any point of view.¹

¹ "The defendant can not be administrator unless letters of administration of the goods, chattels, and credits of the intestate have been granted to him by one of the Surrogates of the state. (2 R. S. 78, §§ 23, 24.) The proper mode of pleading the fact is by a direct allegation that such letters were granted. The defendant has not pursued that course, but pleads that *he was duly appointed administrator*. This allegation consists partly of matter of fact and partly of matter of law, and is not capable of trial. That the defendant was appointed administrator by somebody, or in some form, is a question of fact; but whether he was duly appointed or not is a question of law. The defendant should have stated how he was appointed, and then the court could determine its sufficiency upon demurrer, or if an issue to the country were joined upon the fact of having obtained letters, the question could be tried by jury."—*Per* BRONSON, J., in *Beach v. King* (1837), 17 Wend. 197. "The complaint should state the death of Folsom, his leaving a last will and testament, the appointment therein of the plaintiffs as executors, the probate of the will, the issuance of letters testamentary thereon to the plaintiffs, and their qualification and entry upon the discharge of their duties as executors."—*Per* FIELD, C. J., in *Halleck v. Miner* (1860), 16 Cal. 574, 579.

Accordingly, it has been held insufficient, in the absence of a statute specially permitting it, to aver merely that the plaintiffs "have been duly appointed and qualified by the Surrogate of the County of New York to act as the sole executors of Daniel Fanshaw, deceased." *Forrest v. The Mayor* (1861), 13 Abb. Pr. 350. For instances of averments held sufficient, as against a demurrer for lack of capacity to sue, see *Munro v. Dredging Co.* (1890), 84 Cal. 515; *Brenner v. McMahon* (1897), 20 App. Div. 3.

In some states, it is expressly provided that an executor, etc., need not aver the facts constituting his capacity to sue, but may set up the legal conclusion. See § 3627, Iowa Code, 1897, and *Mayes v. Turley* (1882), 60 Iowa, 407, 410.

On the mode of objecting see *Secor v. Pendleton* (1888), 47 Hun 281. The complaint alleged that "letters of administration were duly issued and granted unto plaintiff, who is in fact alone entitled to the possession of and has sole power, as administrator, etc., to collect the assets and liquidate the business affairs of said firms." It did not state that the intestate died leaving property in the State, or that letters of administration had been issued upon his estate by any Surrogate having that authority in New York. There was a demurrer on the ground that the complaint *did not state facts sufficient to constitute a cause of action*. Said the General Term, *per* DANIELS, J., p. 283: "As it [the complaint] was framed, it did not disclose the existence of any legal capacity on the part of the plaintiff to maintain the action. In *Sheldon v. Hoy*, 11 How. Pr. 11, the objection was raised by the statement in the demurrer that it did not appear that the plaintiff was the administrator of

But I am of opinion, that all the facts necessary to constitute a good cause of action are stated in the second count. This is to be regarded as a complaint by the plaintiff in his own right, and not in his capacity as administrator.

An administrator could always bring trover in his own name, without declaring his representative capacity, for the goods of his intestate converted after his death, even though the conversion was before the granting of administration; because the granting of administration related back to the time of the death, and gave the administrator title by relation. *Valentine* agt. *Jackson*, 9 Wend. 302. This has not been changed by the Code.¹

The ninth cause of demurrer is to the whole complaint; and the second count being good, the plaintiff must have judgment. The judgment of the special term must, therefore, be affirmed.

THOMPSON v. WHITMARSH.

COURT OF APPEALS OF NEW YORK, OCTOBER 6, 1885.

[100 N. Y. 35.]

Appeal from a judgment of the General Term of the Supreme Court, entered upon an order affirming a judgment in favor of the plaintiff, entered upon the report of a referee.

This action was brought to recover the purchase-price of certain personal property which came into the hands of the plaintiff as executrix of Charles Thompson, who died insolvent. The defendant set up as a counter-claim a promissory note, executed by the decedent to him. This was not allowed by the referee.

the goods, chattels and credits of the deceased intestate, which, though not in the language of the Code, was substantially an assertion of the objection that the plaintiff was without legal capacity to sue. And in *Cheney v. Fisk*, 22 How. Pr. 236, a demurrer in this form was also considered to be essential to the presentation of this objection. And that it can not be considered under a demurrer in the form adopted by the defendants is maintained in *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 648, and *People ex rel. v. Crooks*, 53 N. Y. 648. . . . By failing to present the objection, by the demurrer, that the plaintiff had not the legal capacity to recover the demand, the objection has been waived. Code of Civ. Pro. § 499. And that waiver will permit the plaintiff, as administrator, to maintain this action, notwithstanding the defective averment of his appointment to act as such."

That a different rule applies when the action is *against* an executor: *Kingsland v. Stokes* (1879), 58 How. Pr. 1; affirmed, 61 How. Pr. 494; *Kirsch v. Derby* (1892), 96 Cal. 602.

For the application of like principles to *receivers*, etc.: *White v. Jay* (1885), 13 N. Y. 83; *Stewart v. Beebe* (1888), 28 Barb. 34, 37; *Dayton v. Connah* (1899), 18 How. Pr. 326.

—Ed.

¹ In the omitted portion of the opinion the court held that the second count stated facts sufficient to constitute a cause of action, since an allegation that goods, "after being in the possession of the plaintiff came into the possession of the defendant, who, although requested so to do, had not delivered the same to plaintiff but wrongfully detained them from him," is sufficient to establish a conversion.

A. P. Smith, for appellant.

Franklin Pierce, for respondent.¹

FINCH, J.—It is not denied in this case that, irrespective of sections 449 and 1814 of the Code, and before its enactment, an executor or administrator, seeking to enforce a contract made by himself and not by the decedent, could sue in his own name; and that in such action a demand against the decedent belonging to the defendant could not be used as a counter-claim to diminish or extinguish the recovery. It is insisted, however, that the effect of these sections is to change the law, and compel the executor or administrator to sue in his representative capacity where his recovery will be assets, and is for the benefit of the estate.

Under section 449 every action must be brought by the real party in interest, and where the recovery is wholly for the benefit of the estate, it is said that such real party in interest is the executor or administrator, and not the individual who happens to be charged with the trust duties. And this contention is claimed to be strengthened by the language of section 1814, that "an action or special proceeding, hereafter commenced by an executor or administrator, upon a cause of action belonging to him in his representative capacity . . . must be brought by . . . him in his representative capacity."

Here the plaintiff is executrix, and sold upon credit property of the estate to the defendant, who holds an unpaid note of the decedent. The estate is insolvent, and if the defendant can use his demand as a counter-claim, he alone of all the creditors can secure a preference out of the assets, and be paid in full at the expense of others equally entitled to payment. The result would overturn the whole system of distribution to creditors, and compel executors and administrators never to sell on credit at public auction where creditors of the deceased could buy, or in some unexplained way exclude them from the list of purchasers. No such construction of the Code is permissible. Where an executor or administrator sells on credit the property of the estate, and sues to recover the debt, he, as an individual, is the real party in interest, for the contract is made with him, and the promise to pay runs to him, and he is personally accountable for the assets which he has sold. For the same reason the debt does not belong to him, in his representative capacity within the intent and meaning of the section of the Code referred to. That phrase relates to debts which belonged to the testator or intestate, and came to the executor or administrator through his representation of the deceased rather than as the result of his own action. The effect of the section, and the change produced by it, is upon the class of cases in which the action could have been maintained in either form; as where, upon a contract made with the testator, the cause of action accrued after his death; or where, upon a debt or obligation due to the deceased, the

¹ The arguments are omitted.

executor or administrator has taken a new security or evidence of debt. In these cases, before the Code, the action might be in the individual or representative name, but now must be in the latter. Upon new contracts made by the executor or administrator, and never existing in favor of the decedent, but growing out of the contracts and dealing of the former alone, the action is properly brought in the name of the individual, and a debt against the decedent can not be made the subject of a counter-claim. It must be paid in the ordinary course of administration, and can gain no preference, as it is entitled to none.

This particular ground of objection appears not to have been taken at the General Term, and so was not considered in the opinion there rendered, which sufficiently answered the other grounds urged in support of the appeal.

The judgment should be affirmed, with costs.

All concur.¹

Judgment affirmed.

BURRELL v. KEARN.

SUPREME COURT OF OREGON, APRIL 10, 1899.

[34 Ore. 501.]

This was a suit to foreclose a mortgage. The plaintiffs are styled, in the caption or title of the complaint, "Walter F. Burrell and D. P. Thompson, Executors," and it is alleged, among other things, that at all the times stated in the complaint plaintiffs were, and now are, the duly appointed, legally qualified and acting executors of the last will and testament of M. S. Burrell, deceased, and that defendants made,

¹ Compare *Gross v. Gross* (1899), 26 Misc. 385: [After the death of G., goods belonging to his estate were sold by his executors on credit, and these goods not being paid for, one of the executors sued *as executor* to recover the price. The other executor, refusing to join as co-plaintiff, was made defendant with the purchasers. The defendants contended that the plaintiff could not sue *as executor*.] Said the Supreme Court, in appellate term, reviewing a number of cases: "While it would have been better pleading to have declared upon the plaintiff's individual right, we can not, under the authorities, reject the complaint."

See also *Phillips, Ex'r, v. McConica, Guardian* (1898), 59 O. S. 1, 7: [The defendant urged that the plaintiff had no legal capacity to maintain the action *as executor*, because he "can maintain an action in his own personal right for money of the estate wrongfully distributed, as held in *Rogers v. Weaver*, 5 Ohio, 536."'] But said the court, per BURKET, J.: "These considerations are not sufficient to cut off his right to maintain the action *as executor*. The money paid to the guardian was the money of the estate, and an executor is always a proper party to maintain an action to recover money belonging to the estate. Other existing remedies to recover money wrongfully paid out, do not exclude the remedy by action in the name of the executor."

Compare also *Moss v. Cohen* (1899), 153 N. Y. 240, 246: "That the plaintiff entitled the action *as by himself individually and as surviving executor* in no way discloses a misjoinder of causes of action. There is no pretense nor allegation that the plaintiff claimed more than a single right of recovery, and that he sought to enforce *as executor* and for the benefit of the estate he represents."—*Per* MARTIN, J.

—Ed.

executed, and delivered to plaintiffs their certain promissory note, a copy of which is set forth, showing that it was made to "W. F. Burrell and D. P. Thompson, Executors." It is further alleged that, for the purpose of securing the payment thereof, defendants duly made, executed, and delivered to plaintiffs their certain mortgage; and in all other respects the complaint is in the usual form.

The defendants filed a motion to require plaintiffs to make the complaint more definite and certain, so as to show the name of the deceased person for whose estate the plaintiffs sue as the alleged executors. This was overruled, and thereupon a general demurrer was interposed, on the ground that the complaint does not state facts sufficient to constitute a cause of suit. This also was overruled, and defendants refusing to plead further, a decree as prayed for was entered, from which they appeal.

William Wallace Thayer and Henry St. Rayner, for appellants.

Dolph, Mallory & Simon, for respondents.

WOLVERTON, C. J.—It seems to be the theory of the defendants that suit was brought by the plaintiffs in their representative capacity as executors; hence the interposition of both the motion and the demurrer. But the complaint shows, when the documents upon which it is based, the averments touching them, and its whole scope are considered, that the plaintiffs have sued in their individual, and not in their representative, capacity.¹

The prevailing rule seems to be, with possibly some few exceptions, that when the cause of suit or action, whether in contract or in tort, accrues after the death of the testator or intestate, the money, if recovered, will be assets of the estate, and the executor or administrator may sue, at his option, in either his representative or his individual capacity.²

The use of the word "executors" in the title of the case and in the note is a mere *descriptio personæ*, and does not of itself operate to attach to plaintiffs a representative character,³ and may be regarded as surplusage. *Miller v. Kingsbury*, 128 Ill. 45; 21 N. E. 209.

¹ *Citing*, *Beers v. Shannon*, 73 N. Y. 292.

Compare the remark of ANDREWS, C. J., in *First National Bank v. Shuler* (1897), 153 N. Y. 163, 172: "The cases mainly are of two classes, those where the cause of action was upon a right accruing to the plaintiff or existing against a defendant in a representative character, which was imperfectly expressed in the title of the action, and cases where there was an unnecessary addition of a representative title to the name of the party, when in fact the cause of action was upon an individual right or obligation. In these cases it has been held that the title and pleadings may be considered together to ascertain the true nature of the action, and the action will be treated as an individual or representative one, as disclosed upon an inspection of the whole record. *Stilwell v. Carpenter*, 2 Abb. N. C. 238; *S. C.*, 62 N. Y. 639; *Beers v. Shannon*, 73 N. Y. 292; *Litchfield v. Flint*, 104 N. Y. 543; *Jennings v. Wright*, 54 Ga. 537; *Waldsmith v. Waldsmith*, 2 Ohio, 156; *Pennock v. Gilleland*, 1 Pitts. Pa. 37."

² *Citing*, 8 Enc. Pl. & Prac. 658; *Haskell v. Bowen*, 44 Vt. 579; *Grimmell v. Warner*, 21 Iowa, 11; *Mowry v. Adams*, 14 Mass. 327; *Kane v. Paul*, 14 Pet. 33; *Bliss Code Pl.* (3 ed.), § 53.

³ *Citing*, *Beers v. Shannon*, 73 N. Y. 292; 2 Am. & Eng. Enc. Law (1st ed.), 334.

As the note and mortgage in question were made, executed and delivered to the plaintiffs, and not to their testator, they were authorized, under the rule, to sue in either their representative or their individual capacity; and it is apparent that the complaint states a good cause of suit in one or the other capacity, and is amply sufficient as against the test of a general demurrer. Now, it was a matter of no moment to the defendants in what character plaintiffs prosecuted their suit to foreclose, as they could have set up whatever defence they may have in this suit as well as if it had been brought in any other form,¹ and hence there was no error in overruling the motion and demurrer, or in entering the decree appealed from, which will therefore be affirmed.

Affirmed.

On treating the use of the word "executor," "administrator," etc., as a mere *descriptio persona*, compare *Beers v. Shannon* with *Litchfield v. Flint* (1887), 104 N. Y. 543. In the former case it was objected that the plaintiff was not suing in a representative capacity because of the omission of the word "as" between the plaintiff's name, "*John L. Beers*," and the description of him, "*executor of John Beers, deceased*." Said the Court, per FOLGER, J.: "It is true that without that word, in that position, it has been sometimes held that the addition to the name of the party is but a *descriptio persona*, and does not give to him other than a personal or individual character in the action. But it has been held on the other hand, that though there be naught in the title of the process or the complaint to give a representative character to the plaintiff, the frame and averments and scope of the complaint may be such as to affix to him such character and standing. *Stilwell v. Carpenter*, in Mem. 62 N. Y. 639, reported in full in 2 Abb. N. C. 238." And in the case in hand it was held that the plaintiff sued as an executor.

In *Litchfield v. Flint* the Court, per EARL, J., remarked (p. 550): "While the note mentioned in the complaint contains a promise to pay E. B. Litchfield, *as executor of the estate of H. Maria Litchfield, deceased*, the words quoted [in italics] are mere *descriptio persona*. There is nothing in the complaint showing that the loan was made by him as executor and in no other capacity; and upon the facts alleged in the complaint, if Litchfield had desired to commence suit directly upon the note against the maker thereof, he would have been obliged to commence it in his individual name, and in that capacity he would have recovered. *Peck v. Mallams*, 10 N. Y. 509.

"So, too, although in the title of this action, after the word 'Litchfield' the words 'executors of the last will and testament of H. Maria Litchfield, deceased,' appear, yet the action is the individual action of Electus B. Litchfield. The whole body of the complaint shows an action in his favor to enforce an agreement made by him individually with the defendant for the payment of the note given to and held by him individually. In such a case, when the complaint shows a cause of action in favor of the plaintiff, not in his representative but in his individual character, the descriptive words may be rejected, leaving the action to stand as one in the individual capacity of the plaintiff."

—Ed.

¹ *Citing*, *Miller v. Kingsbury*, 128 Ill. 45, 21 N. E. 209.

2. *Guardians.*

NOTE.—In nearly one third of the codes, guardians stand with executors and administrators, and trustees of express trusts, as representatives who may sue in their own names without joining the beneficiaries.¹ Where no such enactment appears, the question has been raised whether, in a code state, a guardian may not sue in his own name as a trustee of an express trust. Or is the doctrine on this point, and in these code states, still that of the common law and the statute of Edward the First?² In states where the enactment does appear, a similar question sometimes arises: Whether a guardian may sue in his own name, under the code, if his ward has come of age before action is brought.

PERINE, AS GUARDIAN, *v.* GRAND LODGE.

SUPREME COURT OF MINNESOTA, JANUARY 18, 1892.

[48 *Minn.* 82.]

Action to recover \$2,000 and interest on account of the death of Sullivan C. Perine while a member of a certain lodge. The jury returned a verdict for plaintiff for \$2,602.74. The defendant moved for a new trial, and, being denied, appealed from the order.³

Adams & Pattee, E. Southworth, and Jos. A. Eckstein, for appellant.⁴

Merrick & Merrick, for respondent.

MITCHELL, J.—This action was brought by and in the name of Louisa Perine, probate guardian of the person and estate of Edward G. Perine, a minor, to recover on a cause of action in favor of her ward, as beneficiary of a contract of insurance upon the life of his father, alleged to have been made by the defendant with the father as a member of a subordinate lodge of the order.

The action should have been brought in the name of the minor. The rule at common law and in equity was that an infant had to sue in his own name but by his guardian or next friend, and this has not been changed by statute. The infant is the real party in interest, and

¹ See the Codes of Kentucky, Iowa, Ohio, Washington, Nebraska, Kansas, Arkansas, Wyoming, Oklahoma.

² "At common law there was no warrant nor authority for a suit by a guardian in his own name for the benefit of the infant, although he might disclose his fiduciary character and purpose. . . . At law the action must have been brought in the name of the party having the legal right. The guardian could of course sue upon contracts made with himself; but not generally for property or money of the infant. The latter was required to be a party to the action, which, at first, he brought by guardian, and afterwards by statute, might bring by *prochein ami*. In the case of *Stewart v. Crabbin*, 6 Mun. 280, the Supreme Court of Virginia reversed a judgment rendered in favor of a guardian in an action brought by himself, upon the ground that the action should have been in the name of the infant. That was trespass for an assault and battery on the infant; but there was no difference, in principle, between such an action and one for a money demand for breach of an obligation. Such was the practice of this state before the Code."—*PER EAKIN, J.*, in *Turner v. Alexander* (1883), 41 Ark. 254, 257.

³ The statement of facts has been abridged.

⁴ The arguments are omitted.

the general statutory rule is that every action must be prosecuted in the name of the real party in interest. 1878 G. S. Ch. 66, § 28, provides that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute may sue without joining with him the person for whose benefit the action is prosecuted. But a guardian appointed by the probate court is not a trustee of an express trust but an officer of the court. There would seem to be no good reason why the statute should not have placed a guardian, as respects his capacity to sue, upon the same footing as an executor or administrator, but it has not done so in any case, unless, possibly, under 1878 G. S. Ch. 66, §§ 33, 34, in the case of the seduction or injury of the ward—a question which we have no occasion to consider here.

Section 148 of the Probate Code (Laws 1889, Ch. 46) provides that every guardian shall demand, sue for, and receive all debts due his ward. The same provision was found in 1878 G. S. Ch. 59, § 29. But this was merely a re-enactment of the common law rule that a suit by an infant must be brought by his guardian. The statute does not say that the guardian shall bring the suit in his own name.

But while this action should have been brought in the name of the ward, yet the guardian is a proper party to the record. He is really the active party who institutes the suit and has the entire control of its prosecution. In such a case we have no doubt of the power of the court, either before or after judgment, in furtherance of justice, to amend by inserting the name of the ward as plaintiff. 1878 G. S. Ch. 66, § 124. The only person who has any control over the action is already in court, and a party to the record. The only object in inserting the name of the infant as plaintiff is that the judgment in the action may be a bar to any subsequent actions by him or in his name.¹

¹ Only so much of the opinion is given as relates to the one point. The order was reversed on other grounds.

On the question whether a general guardian is a trustee of an express trust within the meaning of the Code, and, as such, may sue in his own name, see *Person v. Warren* (1852), 14 Barb. 488, 492; *Thomas v. Bennett* (1868), 56 Barb. 197, 201; *Hauenstein v. Kull* (1880), 59 How. Pr. 24; *Coakley v. Maher* (1885), 36 Hun, 157; *Buermann v. Buermann* (1886), 17 Abb. N. C. 391; *Bager v. Phillips* (1886), 17 Abb. N. C. 425; *Perkins v. Stimmel* (1886), 52 Hun, 520.

In *Perkins v. Stimmel* (1889), 114 N. Y. 359, 363, POTTER, J., remarks: "In *Thomas v. Bennett*, 56 Barb. 197, it was held that a general guardian appointed by the Surrogate can maintain an action in his own name, as such guardian, to recover a debt due to his ward. Judge Foster, writing the opinion of the General Term, reviews a great number of cases in the Supreme Court and the old courts of chancery, and reaches the conclusion stated as above. He seems to have reached that conclusion through analogy to similar cases brought by a committee of a habitual drunkard or lunatic; based upon the principle that such guardian as well as such committee is a trustee of an express trust, and has absolute dominion over the personal property of the ward, with power to sell and confer good title upon the purchaser, to settle any debts and claims belonging to his ward, and to collect the distributive share of the ward in the estate of deceased persons. It was held in the same manner in *Hauenstein v. Kull*, 59 How. Pr. 24. That case was followed and the same conclusion reached in *Coakley v. Maher*, 36 Hun, 157, Judge Follett writing the opinion, which was concurred in by Judges Hardin and Boardman. The question was first practically raised in this court in *Segelken v. Meyer*, 94 N. Y. 473. In that case an action was brought by an infant [in his own name] by his guardian *ad litem*, and the action was

REED, GUARDIAN, *v.* LANE ET AL.

SUPREME COURT OF IOWA, DECEMBER 13, 1895.

[96 *Iowa*, 454.]

Action at law by the guardian of one Lizzie Hostert and other minors upon the bond of a former guardian of the same persons. To an amended petition the defendants filed what purported to be "an equitable answer"; and to the first division of that answer the plaintiffs demurred, on the ground that "the facts therein alleged did not constitute any defence." This demurrer was sustained.¹

Stilwell & Stewart, for appellants.

James H. Trewin, for appellee.

ROBINSON, J.—It is said that the demurrer to the first division is not well taken. That alleges that although the plaintiff was at one time the guardian of Lizzie Hostert, she had before the commencement of this action attained the age of majority, and that, so far as she is concerned, the action is not brought in the name of the real party in interest.

Section 2543 of the code requires that every action be prosecuted in the name of the real party in interest, except as provided in the next section. That permits executors, administrators, guardians, and some others who act in a representative capacity, to sue in their own names without joining the parties for whose benefit the actions are prosecuted. It is the general rule that when a ward attains his majority he may demand an accounting of his guardian, and that the duties of the latter with respect to the active management of the estate cease; the ward then stands in the relation of creditor to the guardian. *Humphreys v. Mattoon*, 43 *Iowa*, 556. But the guardianship

to recover property belonging to the infant. The infant at the same time had a general guardian, and the question presented was whether the action should have been brought in the name of the general guardian or in the name of the infant by his guardian *ad litem*. The Court, in the opinion in that case, reviews numerous cases, and especially *Thomas v. Bennett*, and comes to the conclusion that an action to recover money or personal property belonging to an infant is properly brought in his own name by his guardian *ad litem*. . . In reviewing these various cases upon this question I have been impressed with what I think is the plain theory of the Code, and of the practice upon this subject, viz., that all actions brought by an infant should be brought in the name of the infant by a guardian *ad litem*. . . But while I have reached this conclusion, as a general rule of practice, it can not avail the defendant in this case [the action was in the name of the general guardian] as the objection [to the legal capacity to sue] was not raised by demurrer or answer."

It will be observed that the question in the foregoing cases is quite distinct from that which arises when the guardian sues upon a contract made by him in his own name as guardian. "Certainly, a guardian who takes a note payable to himself and describing himself as guardian, is a trustee of an express trust within the very words of this section" [providing that a "trustee of an express trust" shall be construed to include a person with whom, etc.]—*per* RODMAN, J., in *Mebane v. Mebane* (1872), 66 N. C. 334. See also *Catron v. LaFayette County* (1891), 106 Mo. 659, 667; *Barnwell v. Marion* (1898), 54 S. C. 223, 227.

—Ed.

¹ The statement of facts is abridged from an omitted portion of the opinion.

does not necessarily terminate at the moment the ward becomes of legal age, especially where his interests demand that it continue and he does not object. The guardian should be given reasonable time in which to make an accounting and close his official labors. The division of the answer under consideration did not show that there had been any accounting by the plaintiff for the share of his ward Lizzie in the indebtedness in controversy, nor that any steps have been taken to terminate the guardianship of her estate. The defence relied on in that portion of the answer is merely that the ward has arrived at her majority. So far as the record shows, the action is brought by her consent and for her interest.

In view of the relation in which the plaintiff has stood to her and her property, and the duty which devolved upon him to protect the very interests in controversy, we do not think it is incumbent on him to show in the first instance that his right to protect those interests and enforce them continues, nor that the fact that she has attained her majority is alone sufficient ground for the abatement of the action as to her share in the estate. The plaintiff has been entitled to represent her in actions in court, and if that right has been terminated the fact should be shown, and the proper person made a party to the action. *Roop v. Clarke*, 4 G. Greene, 294. Until that is done, it will be presumed that the action is for her interest, and that she will be bound by the final adjudication.¹

¹ Only so much of the opinion is given as relates to the one point. Compare *Gard v. Neff* (1884), 39 O. S. 607, given in text; *ante*, p. 578. —Ed.

III. PERSONS EXPRESSLY AUTHORIZED BY STATUTE TO SUE IN
THEIR OWN NAMES.SWIFT *v.* ELLSWORTH.

SUPREME COURT OF INDIANA, MAY TERM, 1858.

[10 *Ind.* 205.]

The facts appear in the opinion.

S. A. Huff, Z. Baird, and J. M. La Rue, for the appellants.

R. C. Gregory, H. W. Chase, and J. A. Wilstach, for the appellee.

HANNA, J.—This was an action by Ellsworth, assignee of Rowe, against Swift and Rowe, on a promissory note, made by Swift to Rowe, and to foreclose a mortgage, etc., for \$4,780.

Rowe filed no answer. Swift answered in four paragraphs, setting up, 1. Matters of setoff between himself and Rowe, and also certain counterclaims for damages by way of recoupment. 2. Part payment to Rowe. 3. That Ellsworth was not the real party in interest, but that the note, etc., was the exclusive property of Rowe. 4. As follows:

“That said note was assigned by the defendant Rowe to the plaintiff, by indorsement in blank, as alleged; that it was so assigned and delivered to the plaintiff by Rowe, to secure to said plaintiff \$2,500 which Rowe owed plaintiff, and for no other consideration; that after said assignment and delivery, the defendant Swift paid to the plaintiff the said sum of \$2,500 in full, being all the interest of the said Ellsworth in said note, and that since said payment the said plaintiff has not acquired any interest in the residue of said note; that the said payment is credited on the note, and that the plaintiff is not the real party in interest in this suit, but that the said defendant Rowe is the exclusive owner of said note.”

The appellees insist that, even if this fourth paragraph shows facts sufficient to enable the Court to say that Ellsworth was not the real party in interest, yet, under the statute, he was, as the holder of the note by assignment, entitled to maintain the action in his own name. That statute, 1 R. S. p. 378, is as follows:

Section 1. “All promissory notes, etc., shall be negotiable by indorsement thereon, so as to vest the property thereof in each indorser successively.” Section 2. “The assignee of any such instrument may, in his own name, recover against the person who made the same.”

This statute makes the assignee, for the purpose of suing, the legal holder of the instrument, unless a state of facts may be shown to deprive him of that right, under sec. 3, 2 R. S. p. 27, which is as follows: “Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in the next section.” The provision of the next section is as follows: “An executor, administrator, a trustee of an express trust, or a person expressly authorized by

statute, may sue, without joining with him the person for whose benefit the action is prosecuted."

Is the assignee of a promissory note who may hold it as such, without any real interest, one of that class of persons here referred to as being "expressly authorized by statute" to sue? or does the provision have reference to another class of persons, such as the guardian of an idiot, etc.?

We are of opinion that the clause of this section above quoted, does not have reference to the rights of an assignee of a promissory note, but to such persons as may be authorized to sue in their own names, because of holding some official place; as the president of a bank, under the general law (1 R. S. p. 157), or as the trustee of a civil township (*Id.* 467), etc.

It therefore follows, that the real party in interest, as was formerly the rule in equity, must bring the action, subject to the provisions and exceptions of the statute, and that if any other than those thus authorized should bring suit as plaintiff, an answer showing affirmatively the facts, is a good answer. We think the fourth paragraph of this answer was sufficient. Van Santvoord's Pl. 109, 421, 478.¹

KING, GUARDIAN, v. CUTTS.

SUPREME COURT OF WISCONSIN, JUNE TERM, 1869.

[24 Wis. 625.]

The defendant appealed from a judgment rendered against him in the circuit court, on appeal from a justice of the peace. The facts are stated in the opinion.

C. N. Parsons, for appellant.

Noggle & Castle, for respondent.

DIXON, C. J.—It is unnecessary to inquire whether the plaintiff is a trustee of an express trust, authorized to sue in his own name to recover possession of the real estate belonging to his ward; for even though he were such trustee, it would still follow that this action could not be so maintained.

It is an action of unlawful detainer, instituted under the 12th section of the forcible entry and unlawful detainer act (R. S., ch. 151), to dispossess the defendant as a tenant holding over contrary to the terms of his lease. The premises are the property of the ward, and the lease was executed by him nearly a year before the plaintiff was appointed as his guardian. It is not pretended that the lease was in any respect invalid at the time of its execution. The ward was then a person of full age, and competent to execute it, but subsequently

¹ Part of the opinion, on other points, is omitted. *Per Curiam*—The judgment is reversed with costs. Cause remanded, etc.

imbecility has rendered it proper that a guardian should be appointed for him in accordance with the provisions of the statute in such cases. The plaintiff, having been appointed such guardian, made demand in writing of the defendant, that he deliver possession, and then commenced this action in his own name as guardian. It is clear that the action in this respect is wholly misconceived. It should have been brought in the name of the ward. It is a purely statutory remedy, given only to the lessor, his heirs, executors, administrators, or assigns; and the plaintiff is none of these. It could, at most, only be contended that he was an assign; but he is not that, because, by virtue of his appointment as guardian, he acquired no estate whatever in the lands. They remained the property of the ward, the same as before, and the plaintiff became the mere bailiff or custodian, acting under the direction of the court. This principle is well settled.¹ The plaintiff not being, therefore, an assign, nor belonging to any of the other classes of persons authorized to bring the suit, and so not standing in the relation of landlord to the tenant in possession (see *Winterfield v. Stauss*, 24 Wis. 394), the action can not be maintained by him; and that, regardless of the question whether he is to be deemed a trustee of an express trust, so that he might have sued in some other form of action to recover the possession.

It follows from these views, that the judgment of the circuit court must be reversed, and the cause remanded with directions to enter judgment in favor of the defendant, and against the plaintiff for costs of suit.

By the Court.—So ordered.

PETERS v. FOSTER.

SUPREME COURT OF NEW YORK, GENERAL TERM, MAY, 1890.

[56 Hun 607.]

From an interlocutory judgment overruling his demurrer to the complaint, the defendant appealed.

Benjamin B. Foster, for the appellant.

Charles F. MacLean, for the respondent.

BARRETT, J.—The Exchange National Bank, of Norfolk, Virginia, was organized under the laws of the United States, and was located in the State of Virginia. It was, therefore, a foreign corporation, as defined by the code of civil procedure (§ 3343, subd. 18). The question is, whether the plaintiff, as receiver of this foreign corporation, appointed by the Comptroller of the Currency, can maintain an action in the courts of this state to recover an assessment duly levied upon the shareholders of the bank.

¹ *Citing*, *Petrie v. Shoemaker*, 24 Wend. 85; *Lane v. Schermerhorn*, 1 Hill, 97; *McKillop v. McKillop*, 8 Barb. 552.

Two points are presented by the appellant: *first*, that the plaintiff is to be treated as a foreign receiver, and, as such, denied a standing in our courts; *second*, that he is not the real party in interest. . . .¹

The remaining question is whether the plaintiff is the proper person to sue. This question has been settled adversely to the appellant. *Stanton v. Wilkenson*, 8 Benedict, 359; *Bank v. Kennedy*, 17 Wall. 21; *Kennedy v. Gibson*, 8 Wall. 498; *Bank of Bethel v. The Pahquioque Bank*, 14 Wall. 383; *Platt v. Crawford*, 8 Abb. N. S. 308.

Under section 449 of the Code a person expressly authorized by statute to sue is excepted from the provision that the action must be prosecuted in the name of the real party in interest. Here the receiver is so expressly authorized. See the cases above; see, too, Rev. Stats. of U. S. §§ 5234, 5151; also, act of Congress Feb. 14, 1880, Chap. 25, § 1. And this is entirely reasonable. For the bank is not the real party in interest, but its creditors; and whatever the receiver collects he must pay over to the treasurer of the United States, for the benefit of these creditors.

The interlocutory judgment appealed from should, therefore, be affirmed, with costs.

VAN BRUNT, P. J., and BARTLETT, J., concurred.

Interlocutory judgment affirmed with costs.

GOULD AND OTHERS, COMMISSIONERS OF HIGHWAYS OF
THE TOWN OF LISBON, v. GLASS.

SUPREME COURT OF NEW YORK, GENERAL TERM, JANUARY 1, 1855.

[19 Barb. 179.]

This was an appeal from the St. Lawrence county court.

The complaint was as follows:

"Calvin H. Gould, John Sheldon and John McBride, commissioners of highways of the town of Lisbon, against John Glass.

"The plaintiffs above named complain of the above named defendant and say that on, etc., he wrongfully obstructed a certain highway in the town of Lisbon, by, etc., so as to obstruct and prevent the use of the same by the public."

Also for a further cause of action, the plaintiffs state that the defendant did, etc., setting forth another like obstruction. Judgment was demanded for a penalty of \$5 for each obstruction, according to the provisions of the statutes.

¹ On the first point, the court was of opinion that the plaintiff was not to be treated as a foreign receiver, in the strict sense. "Technically, it is true, he is the receiver of a foreign corporation. It will be observed, however, that he is not a receiver appointed by the courts of a foreign county, or even of a sister state, but by an officer of the United States, under authority derived from national legislation."

The answer denied the complaint, and also set up title to the *locus in quo* in the defendant, and denied that it ever was a highway.¹

The jury found for the plaintiffs. Upon judgment being entered thereon, the defendant appealed to this court.

T. V. Russell, for the plaintiffs.

Morris & Cooley, for the defendant.

By the Court, JAMES, J.—The penalty sought to be recovered by this action is one in which the plaintiffs, as individuals, have no interest; and, therefore, if the action is not brought in their official character, it can not be sustained; and this question must be determined by the complaint, which also includes the title of the cause. The statutes provide that actions may be brought by commissioners of highways in the name of their office. (2 R. S. 473, §§ 92, 93.) And the supreme court has held that such actions are properly brought in the name of the individuals with the addition of their name of office.² But when actions are thus brought, the pleading should, by proper averments, show that the claim is made by the officer, and not by the individual.

The complaint in this action, tested by the principles laid down in *Merritt v. Seaman*, 2 Selden, 168; *Ogdensburgh Bank v. Van Rensselaer*, 6 Hill, 240; *Delafield v. Kinney*, 24 Wend. 345, and *Hunt v. Van Alstyne*, 25 Id. 605, and numerous other cases of like character, is an action in favor of the plaintiffs as individuals, and not one "in their name of office." The affix to their names in the title is a mere *descriptio personae*. The declaration in *Merritt v. Seaman* was almost identical with the complaint in this. It was "Charles H. Merritt, executor, etc., of John Simpson, etc., plaintiff, etc." In deciding that case, the court of appeals says, "This is the only part of the declaration that contains any indication that the suit is brought by the plaintiff in any other than his individual character. The promises are all laid to the plaintiff individually, and no mention is made of letters testamentary, either in the declaration or the testimony. This mode of describing the plaintiff as executor is, upon all the authorities, to be regarded as merely a *descriptio personae*, in no respect changing the character of the pleadings, or the rights of the parties under them." Justice Cowen, in *Hunt v. Van Alstyne*, 25 Wend. 605, said, "The declaration is one by the defendant Hunt in his own right; calling himself president of a certain company is a mere *descriptio personae*." In the case of the *Ogdensburgh Bank v. Van Rensselaer*, Justice Bronson said, "This is an action against Henry Van Rensselaer, and the words which follow his name, 'president of the St. Lawrence Bank,' can only be regarded as a *descriptio personae*." The question has been decided in *Delafield v. Kinney*. It was also decided at the

¹ Part of the statement of facts is omitted.

² *Citing*, *Supervisor of Galway v. Stimson*, 4 Hill, 136. *Overseers of Pittstown v. Overseers of Plattsburgh*, 18 John. 407. *Todd v. Birdsall*, 1 Cowen, 260.

last term, on the argument of a cause where the declaration was framed in the same way against an executor; and it is decided in all the precedents in the books.

In the present action, the title is the only part of the complaint which contains any intimation that the suit is brought by the plaintiffs in any other than their individual character. They nowhere aver that they are commissioners of the town of Lisbon, or complain *as such*. It is the *plaintiffs* that complain of the defendant; it is the *plaintiffs* that demand judgment; it is Galvin H. Gould, John Sheldon, and John McBride, plaintiffs, that have obtained the judgment, and not the commissioners of highways, nor Gould, Sheldon, and McBride, *as* commissioners of highways. The word "plaintiffs", as used in the complaint and in the judgment, can only be held to mean the individuals, and not the officer.

It was urged "that the plaintiffs intended to sue in their official character, as was evident from the claim." I have not the least doubt in that. But we are not interpreting a contract, and searching out the meaning of parties from doubtful and equivocal words. It is the construction of a pleading, which must be construed according to what it says, and not what the pleader intended. (6 Hill, 240.) The plaintiffs should have averred that they were commissioners; that as such they complained of the defendant; and the judgment should have been entered in their favor as commissioners, etc. As now entered, the record would be no bar to another action for the same obstructions, properly brought by the commissioners. . . .

The judgment of the county court must be reversed.

HEDGES v. DAM.

SUPREME COURT OF CALIFORNIA, JUNE 13, 1887.

[72 Cal. 520.]

The action was brought by a tax-payer to recover the amount of certain illegal claims alleged to have been unlawfully allowed and ordered paid by three of the defendants as members of the board of supervisors of Yuba County, out of the county treasury.

Cross & Simmonds, for appellant.

E. A. Davis and *A. L. Hart*, for respondents.

PATTERSON, J.— . . . 3. No reasons are set forth in the complaint why this action is prosecuted by and in the name of the plaintiff, a tax-payer, instead of by the district attorney, in the name of and in behalf of the county. It is not alleged even that any demand was made by the plaintiff, either for the money, or for the institution of an action for its recovery. The county is the real party in

interest, and the district attorney is the proper person to prosecute actions in the name of the county (*Pol. Code*, § 4256, subd. 3; *County Government Act*, § 136). If it be admitted that a tax-payer has the right, even in the absence of an express statutory authority, to prosecute actions of this kind, yet we think facts should be alleged showing a refusal or neglect on the part of the proper officer to institute an action.

Judgment affirmed.

ERVIN ET AL. v. THE STATE EX REL. WALLEY.

SUPREME COURT OF INDIANA, NOVEMBER TERM, 1897.

[150 *Ind.* 332.]

From the Delaware Circuit Court.

J. W. Ryan, W. A. Thompson, and Warner & Brady, for appellants.

M. E. Forkner, J. G. Leffler, and James N. Templer & Son, for appellee.

MCCABE, C. J.—The appellee sued the appellants to recover money alleged to have been lost by William A. Walley, the relator's husband, to the appellees, by betting on a game called faro, under §§ 6676, 6678, Burns' R. S. 1894 (§§ 4951, 4953, R. S. 1881). The complaint was in five paragraphs, and the court overruled a several demurrer by the defendants to each paragraph for want of sufficient facts, and that the plaintiff had no capacity to sue.

A trial of the issues resulted in a verdict and judgment for \$5,414.50 over appellants' several and joint motions for a new trial. The court also overruled appellants' motion to modify the judgment.

The errors assigned call in question these several rulings, and also call in question the sufficiency of the complaint. . . .¹

It is next contended that the demurrers ought to have been sustained because the action is not prosecuted in the name of the real party in interest, namely, Nellie A. Walley, but is prosecuted in the name of the state.

It is conceded that the statute on which the action is founded authorizes the prosecution of the action in the name of the state for the benefit of the wife of the loser, under certain circumstances, but it is contended that such statute was passed prior to the code, and that the code makes a different provision in relation thereto, and must be deemed the last expression of the legislative will, and controlling in this respect. Conceding, without deciding, that such was the order of passage of the two statutes, and that the last act would have the effect to modify the first in so far as inconsistent therewith, we do not

¹ The omitted portion of the opinion affirmed the constitutionality of the statute on which the action was based.

think that there was any such inconsistency. Section 251, Burns' R. S. 1894 (251 R. S. 1881), provides that; "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in the next section." The next section provides that: "An executor, administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted." The State is authorized by the statute in question to sue for the benefit of another, and the State is within the meaning of the last section of the code, if the word "person" as used therein may be held to include the State.

Among the rules for the construction of the code, it is provided in section 1309, Burns' R. S. 1894, (1285, R. S. 1881), that: "The word 'person' extends to bodies politic and corporate." Webster defines the words "body politic" to be "the collective body of a nation or state as politically organized, or as exercising political functions; also a corporation."

Therefore, we hold that the code does not require the action to be brought in the name of the real party in interest, where, as here, a person, the State, is expressly authorized by statute to sue without joining the person for whose benefit the action is prosecuted.¹

It is further contended that the State alone is the only proper party plaintiff, where, as here, the action is brought for the benefit of the wife of the loser. The statute quoted requires the action in such cases as this to be brought in the name of the State. That means that the State must be the plaintiff. It requires no relator. *Shane v. Francis*, 30 Ind. 92. But the action here is brought in the name of the State as plaintiff. The relator is not a party plaintiff, but is simply a relator. If she becomes a party plaintiff by being named as a relator, it would make the complaint bad in every paragraph for want of sufficient facts. This is so, because the right of action is not vested in her by the statute; and it has been long settled in this court that a complaint by several plaintiffs which fails to state a cause of action in favor of any one or more of them is bad on demurrer for want of sufficient facts as to all of them so joined.²

But the naming of the relator not having the effect of making her a party plaintiff, the State is the sole party plaintiff, and the action was prosecuted in its name as plaintiff. Hence that part of the claim naming Nellie A. Walley as relator is mere surplusage and does not vitiate the complaint.

It is also contended that the fourth paragraph of the complaint is

¹Part of the opinion, on other points, is omitted.

²*Citing*, *Nave v. Hadley*, 74 Ind. 155; *Schee v. Wiseman*, 79 Ind. 389; *Ætna Insurance Co. v. Kittles*, 81 Ind. 96; *Headrick v. Brattain*, 83 Ind. 188; *Thomas v. Irwin*, 90 Ind. 557; *Field v. Holzman*, 93 Ind. 205; *Jones v. Cardwell*, 98 Ind. 331; *Holzman v. Hibben*, 100 Ind. 338; *Brumfield v. Drook*, 101 Ind. 190; *Ohio, etc., R. W. Co. v. Cosby*, 107 Ind. 32; *Brown v. Critchell*, 110 Ind. 31; *Peters v. Guthrie*, 119 Ind. 44; *Kelley v. Adams*, 120 Ind. 340; *Pfister v. Gerwig*, 122 Ind. 567; *Renihan v. Wright*, 125 Ind. 536; *Lake Erie, etc., R. R. Co. v. Priest*, 131 Ind. 413.

bad on demurrer for want of sufficient facts, because it alleges "that the \$6,000.00 of the money so lost by the said William A. Walley was then and there the personal property of and belonged to the said Nellie Walley, . . . the same being at the several times it was wagered, lost, and paid, as aforesaid, in the possession of the said William A. Walley, her husband, as her trustee."

The action authorized by the statute under consideration is one that could not be maintained at common law. Because of the parties to the bet being *in pari delicto*, the common law would leave them where they had placed themselves.¹ Nor would the action lie at common law to recover the money in the name of the State, or anybody else, for the benefit of the wife or children of the loser, nor for the benefit of the common schools. In other words, the legislature in passing the statute intended to create a new right of action that had no existence at common law, and such a right of action as could rest alone upon the statute. The statute, nor any part thereof, can not be applied to aid or help a cause of action the right to maintain and prosecute which existed at common law independent of and without the statute.

If the money, as alleged in the fourth paragraph, was the personal property of Nellie A. Walley, and her husband had possession of it as her trustee, he had no right to gamble it away. "It is now a universal rule that all those who take under the trustee, except purchasers for a valuable consideration without notice, take subject to the trust." 1 *Perry on Trusts*, section 346. The winner of her money became her trustee therefor, and liable to account and pay over the same to her. 2 *Perry on Trusts*, section 828. Having received the money in violation of law and without any consideration, he became a trustee *de son tort*, and liable to a suit by the *cestui que trust* to recover the money.²

It therefore clearly appears that the statute in question does not provide for the recovery of the wife's money gambled away by her husband, either in the name of the State as plaintiff, or in any other name, because she already had the right to recover it in her own name. Though she was a married woman, whose husband was still living, the statute empowered her to sue alone. It provides that: "A married woman may sue alone—First. When the action concerns her separate property." Section 255, Burns' R. S. 1894 (254 R. S. 1881). The allegations of the paragraph show that the money was her separate property, and this court has held correctly that she may

¹ *Citing*, *Woodcock v. McQueen*, 11 Ind. 14; *M'Hatton v. Bates*, 4 Blackf. 63.

² *Citing*, 1 *Perry on Trusts*, section 245, and, to the same effect, *McFadden v. Wilson*, 96 Ind. 253; *Causidore v. Beers*, 1 Abbott's App. Dec. (N. Y.), 333; *Mason v. Waite*, 17 Mass. 560; *Doyle v. McIntyre*, 71 Ga. 673; *Corner v. Pendleton*, 8 Md. 337; *Burnham v. Fisher*, 25 Vt. 514; *Pierson v. Fuhrman*, 1 Colo. App. 187, 27 Pac. 1015; *Conway v. Conway*, 24 N. Y. Supp. 261; *McAllister v. Oberne*, 42 Ill. App. 287.

sue concerning it alone, without joining her husband. *Mills v. Winter*, 94 Ind. 329.

Another section of the code already referred to, goes further than to confer upon her permissive authority to sue in her own name, but imperatively requires as we have seen, that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided in the next section." And the next section, as already observed, provides that "a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted." Sections 251, 252, Burns' R. S. 1894, (251, 252, R. S. 1881.) But we have already seen that the statute on which this action is founded does not authorize the State or any other person to sue for the benefit of the owner of money gambled away by the trustee of the owner.

But, going beyond the briefs on either side, it may be said that there is no allegation in the fourth paragraph that Nellie A. Walley's money was gambled away by her husband and trustee without her knowledge and consent, and hence it may be urged that as there is nothing in the paragraph negating such knowledge, consent, or direction, the transaction may be regarded as one in which she was *particeps criminis*, and therefore the loser within the meaning of the statute, and authorized to recover by action founded on the statute.

This, however, would make the paragraph still worse. If she participated in the illegal transaction and thereby became the loser, and as such authorized to recover her money by action founded on the statute, she must sue in her own name, just as her husband or anybody else must, when suing as loser. But that is not all. She must sue within six months. But the paragraph expressly states that more than six months had elapsed when the action was brought. So it will not aid the paragraph to indulge the presumption that Mrs. Walley's money was gambled away with her knowledge, consent, and direction, in the absence of averments to the contrary. The presumption is to the contrary and in favor of honesty and fair dealing, innocence and against fraud.¹

Hence we are authorized to presume that her money, alleged to have been gambled away by her husband, was so gambled away without her knowledge, consent, or connivance, and hence a common law right to recover it back on her behalf arose; and the code authorized her to invoke that right of action in her own name, and prevents the action from being brought in any other name.

Therefore, the case made by the fourth paragraph of the complaint falls squarely within the first section above referred to requiring that every action must be prosecuted in the name of the real party in interest. That party was Nellie A. Walley and not the State of Indiana.

¹ *Citing*, 1 Rice Ev. pp. 88, 89 and 96; Louisville, etc., R. W. Co. v. Thompson, 107 Ind. 442; Hunt v. Elliott, 80 Ind. 245, 41 Am. Rep. 794.

Where the facts stated in the complaint show that the plaintiff is not the real party in interest, and there is no statute expressly authorizing the plaintiff to sue without joining with him the person for whose benefit the action is prosecuted, as is the case here, such complaint is bad on demurrer for want of sufficient facts to constitute a cause of action.¹

It follows that the fourth paragraph of the complaint does not state facts sufficient to constitute a cause of action, because the State, the sole plaintiff, has no right to maintain the action under the facts stated therein.

It is, however, contended by the learned counsel for the appellee that the error, if error there was, in overruling the demurrer to the fourth paragraph was harmless, and no cause for reversal. It is true, if it affirmatively appeared that the verdict and judgment rested on the other, or any of the other paragraphs, then the error of overruling the demurrer to the fourth paragraph would be a harmless error. But the learned counsel for the appellee broadly concede, that "it affirmatively appears that the judgment rendered was rendered on all the paragraphs of the complaint," referring to the answer to interrogatory 48. Another thing appears in the record, that would seem to indicate that the judgment rests on the fourth paragraph, and that is, instead of being rendered in favor of the plaintiff, the State of Indiana, for the benefit of Nellie A. Walley, it is rendered in favor of Nellie A. Walley alone. But it is enough to make the error harmful, and cause for reversal, that the record fails to show affirmatively that the verdict and judgment rest exclusively on other paragraphs than the fourth. *Rowe v. Peabody*, 102 Ind. 198; *Elliott's App. Proc.*, section 666, and cases there cited.

The learned counsel, however, refer to the code providing that: "No objection taken by demurrer, and overruled, shall be sufficient to reverse the judgment, if it appear from the whole record that the merits of the cause have been fairly determined." Section 348, Burns' R. S. 1894 (345 R. S. 1881). And they refer also to a decision of the Appellate Court applying that section of the code. *Lake Shore, etc., R. W. Co. v. Kurtz*, 10 Ind. App. 60. But they could have found several cases in this court where that provision of the code had been applied, *Baker v. Pyatt*, 108 Ind. 61; *Miller v. Bottenburg*, 144 Ind. 312. But those cases show that said section of the code had no application where the record fails to show that the ruling on the demurrer was harmless. As was said in *Chapman v. Jones*, 149 Ind. 434, "a cause can have no merits where there is no complaint, or where the complaint, as here, does not state facts sufficient to constitute a cause of action."

¹ *Citing*, *Rawlings v. Fuller*, 31 Ind. 255; *Smock v. Brush*, 62 Ind. 156; *Shoemaker v. Board, etc.*, 36 Ind. 175; *Board, etc., v. Jameson*, 86 Ind. 154; *Pixley v. Van Nostern*, 100 Ind. 34.

For the error in overruling the demurrer to the fourth paragraph of the complaint, the judgment is reversed, and the cause remanded, with instructions to the trial court to sustain the demurrer thereto.¹

STATE OF NEBRASKA v. HAYDEN.

UNITED STATES CIRCUIT COURT, D. NEBRASKA, AUGUST 10, 1898.

[89 *Fed. Rep.* 46.]

Motion by defendant to strike the amended petition from the files.

C. J. Smyth, Atty. Gen., and *Ed. P. Smith*, Dep. Atty. Gen., for the State of Nebraska.

Cobb & Harvey and *G. M. Lambertson*, for defendant.

MUNGER, District Judge.—This action was originally begun by Joseph S. Bartley, as treasurer of the State of Nebraska, against the defendant, as receiver of the Capital National Bank, to recover the sum of \$236,361.83, with interest thereon.

The petition, among other things, alleged the election and qualification of the plaintiff as state treasurer of the State of Nebraska, and of John E. Hill, the predecessor of plaintiff in office, as such state treasurer; that said Hill during his term of office deposited with the Capital National Bank divers sums of money belonging to the State of Nebraska, and took certificates of deposit therefor; that on the expiration of his term of office said Hill turned over to plaintiff, as his successor, said certificates of deposit as part of the funds belonging to said state; that said certificates were accepted by plaintiff, and by him, on or about the 16th day of January, 1893, deposited in the Capital National Bank, and the amount thereof was credited by said bank to the account of plaintiff as state treasurer; that on or about the 14th day of January, 1893, the said Capital National Bank executed a bond unto the State of Nebraska in the penal sum of \$700,000, with sureties, in pursuance of the provisions of an act of the legislature of the State of Nebraska approved April 8, 1891, entitled, "an act to provide for the depositing of state and county funds in banks"; that on or about said 14th day of January, 1893, said bond and the sureties thereon, were duly approved by the governor, the secretary of state, and the attorney general; that on or about the 20th day of January, 1893, said bank suspended business and the defendant was appointed receiver thereof, by the comptroller of the currency; that there was, at the time of the suspension of said bank, to the credit of plaintiff, as such treasurer, the sum of \$236,361.83, a portion of the deposit so as aforesaid made; that plaintiff presented to the defendant, as receiver, a duly verified claim for said funds, which

¹ Rehearing denied April 21, 1898.

was disallowed. Subsequently plaintiff filed an amended petition, stating substantially the same facts as in the original petition, except that said amended petition did not show that said bank gave the bond or otherwise qualified as a state depository under the provisions of said legislative enactment.

A demurrer was filed to said amended petition, on the ground that the court did not have jurisdiction of the action, and that the petition did not state a cause of action. The demurrer was heard by Judge Shiras, and overruled.¹

After the expiration of the term of office of plaintiff, Joseph S. Bartley, the action was revived in the name of John B. Meserve, the then state treasurer. Thereupon Meserve filed an amended petition, stating substantially the same facts as in the original petition, except as to the deposit in said bank of said certificates by said Bartley. In the amended petition filed by the said Meserve, it is stated that on or about the 16th day of January, 1893, the said Bartley, as state treasurer, presented said certificates of deposit to the bank for payment, that the same were paid, and that the money received in payment of said certificates was deposited by Bartley in the bank to his account as state treasurer.

To this petition defendant demurred, stating as grounds thereof, that the court had no jurisdiction; that the plaintiff had not legal capacity to sue; that said petition does not state facts sufficient to constitute a cause of action. The demurrer was sustained for the reason that the plaintiff did not have legal capacity to sue; that the action should have been brought in the name of the state of Nebraska, as plaintiff; and, on motion, the state was substituted as plaintiff. Thereupon the state of Nebraska filed its amended petition, stating the facts substantially as they were alleged in the petition filed by Meserve as treasurer.

The defendant now moves the court to strike the amended petition of the state from the files for the following reasons: (1) There is an improper substitution of parties plaintiff by attempting to substitute the state of Nebraska as plaintiff in the place of J. B. Meserve, state treasurer. (2) There is an attempt in said amended petition to substitute the cause of action of the plaintiff from one depending upon a statute created for the purpose of recovering public money deposited without authority of law and substitute a cause of action depending upon a statute created for the purpose of permitting the recovery of money deposited under contract. (3) The said amended petition attempts to change the cause of action from an action which is *ex delicto* to an action which is *ex contractu*. (4) The said amended petition is an attempt to shift the action by amendment from a cause of action which is barred by the statute of limitations to a cause of action which is not barred by the statute of limitations. (5) Because said

¹ In *Bartley, Treasurer, v. Hayden* (1896), 74 Fed. Rep. 913.

amended petition is a complete departure from the original action, and, in effect, the commencement of a new suit, with different parties and different cause of action, brought under different rights of action.

At the hearing on the demurrer to the petition of Treasurer Meserve, it was argued on the part of defendant that the action should have been brought in the name of the state, rather than that of the treasurer; that the provisions of the legislative enactment of 1879 (Comp. St. 1897, p. 116, § 655) authorizing suits to recover public funds in the name of the treasurer were enacted by reason of the holding of the court in *State v. Keim*, 8 Neb. 63; that the unauthorized deposit of public funds by the treasurer did not create the relation of debtor and creditor between the bank and the state; that since the depository act of 1891 (Comp. St. 1897, p. 1056, §§ 5088-5090) the deposit of public funds under the provisions of that act creates the relation of debtor and creditor between the bank and the state, and relieves the treasurer from liability for a loss of the funds, so that the provision of the code requiring every action to be prosecuted in the name of the real party in interest governs; that the action could only be brought in the name of the treasurer when the deposit was made in violation of the provisions of the depository statute and not in a designated depository.

This view of the law was accepted by the court, and the demurrer sustained, but leave was given to amend by substituting the state of Nebraska as plaintiff in the place of the treasurer. The motion to strike the petition of the state challenges the correctness of this ruling of the court. If the substitution of the state as plaintiff instead of the treasurer was a change of the cause of action, then such substitution should have not been permitted as an amendment.

Wood v. Circuit Judge, 84 Mich. 521, 47 N. W. 1103, was a case where a husband died intestate, leaving a benefit certificate payable to his wife; but she had died the previous day, bequeathing her property to him. Afterwards her administrator with the will annexed sued on the certificate. Whereupon the husband's heirs applied for an order substituting them as parties plaintiff, which was refused by the trial court. The supreme court held that, as the suit of the administrator was for the benefit of the husband's heirs, the substitution would not introduce a new cause of action, and that the order should have been granted. The court, in the opinion, say: "Clearly, in this case, the money due upon this insurance certificate is payable to the heirs of Frank L. Silver, and it would be a denial of justice not to permit this amendment. . . . If the real party remain the same, and the change is of the nominal parties only, the amendment is permissible. . . . The amendment is in the furtherance of justice, and the insurance company can not be surprised by it; neither will they be deprived of any substantial or essential rights in the premises."

Lake Erie & W. R. Co. v. Town of Boswell [137 Ind. 336], 36 N. E.

1103, was a suit brought by the trustees of the town of Boswell to enjoin the appellants from interfering with the free use of a public street in the town. On demurrer to complaint the court permitted an amendment by substituting the town of Boswell as plaintiff instead of the trustees of the town. The court said: "Whatever informality there may have been in the action of the court, we think the proper result was arrived at. The same end would finally have been attained if the suit were dismissed, and a new suit brought in the name of the proper party. But we are of the opinion, as stated in *Burk v. Andis*, 98 Ind. 59, that a plaintiff in such a case ought not to be compelled to dismiss his suit, and bring a new one, when a simple amendment to the complaint would save both delay and additional costs."

Wells v. Stombeck, 59 Iowa, 376, 13 N. W. 339, was an action brought in the name of Washington township on a supervisor's bond. A demurrer to the petition was sustained on the ground that plaintiff had no legal capacity to sue; whereupon an amended petition was filed, making the clerk of the township plaintiff. This amendment was sustained. Seevers, C. J., rendering the opinion of the court, said: "We are asked whether the plaintiff, having commenced the suit in the name of the township, could amend the petition, making the clerk plaintiff. In *Township of West Bend v. Munch*, 52 Iowa, 132, 2 N. W. 1047, it was held a township did not have legal capacity to sue. This being so, it is claimed that there was no plaintiff named in the original petition, and, therefore, none could be substituted; that an amended petition could not be filed, because there was nothing to amend. But we think, when there is an appearance to the action, and the defendant tests the right of the named plaintiff to maintain the action by a demurrer, and the latter is sustained, the name of the proper parties plaintiff may be substituted in the action by an amended petition, subject, of course, to an equitable apportionment of the costs and the right of the defendants to a continuance if taken by surprise. If this is not the rule, the action must abate, and another be brought. This, under the statute, should not be the rule unless substantial justice so demands. The statute, in terms, provides that the court, in furtherance of justice, may permit a party to amend any pleading 'by adding or striking out the name of a party, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defence, by conforming the pleadings or proceedings to the facts proved.' The defendants could make their defence in this action as well as in the new one, and they could not have been prejudicially affected by the amendment, and the right to make it we think existed."

To the same effect are *Wilson v. Welch*, 157 Mass. 77, 31 N. E. 712; *Buckland v. Green*, 133 Mass. 421; *McCall v. Lee*, 120 Ill. 261, 11 N. E. 522.

In 1 Enc. Pl. & Prac. p. 538, it is stated that the name of one for whose use the action is brought may be substituted for that of the

nominal plaintiff, where the legal right of action is shown to be in the former, citing many cases.

Section 144 of the Nebraska Code (Comp. St. 1897, p. 1187), relating to amendments of pleadings, is in nearly the identical language of the Iowa statute above quoted by the court, and in this case the cause of action as stated in the amended petition filed in the name of the state is identical with the cause of action stated in the petition by Treasurer Meserve. The action, as brought originally in the name of the treasurer, was to recover judgment for and on behalf of the state. The proofs in both cases would necessarily be the same. No other or different defence to the merits could be made in the one case which was not equally available in the other. I do not think the decisions of the supreme court of this state are in conflict with the rule stated in the foregoing cases.

Bank v. Ketcham, 46 Neb. 568, 65 N. W. 201, and *Flanders v. Lyon*, 51 Neb. 102, 70 N. W. 524, were both cases in replevin, in which it was held that, after the property had been taken under the writ from the defendant, and delivered to the plaintiff, neither the affidavit in replevin nor the petition could be amended, against the objection of defendant, by substituting a stranger as plaintiff. These cases contained nothing in conflict with the doctrine before stated. It may well be said that when a party obtains possession of property under a writ of replevin he can not be permitted to escape a judgment for a return of the property, or its value in money, by having a stranger substituted in his stead,—one perhaps irresponsible.

In *Burlington Relief Dept. v. Moore* [52 Neb. 719], 73 N. W. 15, an action brought by the plaintiff as administratrix, an amendment permitting a recovery in her own individual right was sustained.¹

*The motion is overruled.*²

¹ See also *Bigelow v. Draper* (1896), 6 N. D. 152, 157: Action to condemn property for railway purposes, brought in the name of the receivers of the railway company. Held, that the action should have been brought in the name of the company, but that it was not error for the court, after verdict fixing the compensation for the property taken, to amend by inserting the name of the corporation.

The court, in *Nebraska v. Hayden*, ruled against the defendant also on the second, third and fourth grounds of the motion, holding that they were "based on the erroneous supposition that by the original petition it was sought to recover for the deposits of the public funds made by Treasurer Hill during his term of office, before the depository law went into effect, while the amended petition, now under consideration, is a claim for deposits made by Treasurer Bartley under the provisions of the depository law. The two petitions do not state the cause of action in identical language, yet they are substantially alike in the statement of the cause of action. Both are based on the deposits made by Bartley after the depository law had gone into effect, and after the bank had become a designated state depository. It is true that in the original petition the allegation is that Bartley deposited in the bank certificates of deposits received from Hill, and that the bank gave him credit therefor to his account as treasurer, while in the amended petition, now under consideration, the allegation is that Bartley presented the certificates to the bank for payment, received payment thereof, and deposited the proceeds in bank. The legal effect was the same. It is only a different method of stating the same cause of action. *Allibone v. Ames* [9 S. D. 74], 68 N. W. 165; Post, J., in *State v. Hill*, 47 Neb. 537, 66 N. W. 541; *State v. McFetridge*, 84 Wis. 473, 54 N. W. 1, 998."

² See also *Commissioners v. Caudler* (1898), 123 N. C. 682. And compare *Dubbers v. Goux* (1875), 51 Cal. 135; *Hallett v. Larum* (1897), — Idaho, —; 51 P. 108. —Ed.

GENERAL INDEX.

[In this index, the word *complaint* stands for either "complaint" or "petition;" the word *demurrer* denotes a demurrer on the ground that the pleading demurred to does not state facts sufficient to constitute a cause of action or a defence.]

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